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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

WHEC, INC. and
VETERANS BROADCASTING COMPANY, INC., *Petitioners*

v.

FEDERAL BROADCASTING SYSTEM, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, WHEC, Inc. and Veterans Broadcasting Company, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case (*Federal Broadcasting System, Inc.* v. *Federal Communications Commission*) on July 28, 1955.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, *infra*, p. 1a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1955. (R. 176; Appendix A, p. 15a, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and 47 U.S.C., Section 402 (j).

QUESTIONS PRESENTED

1. Whether a late-filing applicant is a "party in interest" and, hence, is entitled to file a "protest" to the grant of an application by the Federal Communications Commission under Section 309 (c) of the Communications Act (47 U.S.C. § 309 (c)).

2. Whether a standard (AM) broadcast station licensee is, *per se*, a "party in interest" entitled, under Section 309 (c) of the Communications Act (47 U.S.C. § 309 (c)), to protest a grant of television construction permits by the Federal Communications Commission.

3. Whether a justiciable case or controversy is presented under Article III, Section 2, of the Constitution by an appeal, under Section 402 (b) of the Communications Act, from the denial of a "protest" filed under Section 309 (c) of the Communications Act, where the interest of the appellant arises solely out of expected, but undemonstrated, economic competition from the "protested" grants.

4. Whether Section 309 (c) of the Communications Act requires the Federal Communications Commission,

upon the basis of vague and conclusory allegations made by a protesting party, to hold a hearing on construction permit grants already found by the Federal Communications Commission to be in the public interest.

ARTICLES OF THE CONSTITUTION AND STATUTES INVOLVED

Article III, Section 2, of the Constitution of the United States provides in pertinent part as follows:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Sections 309 (a) and (c) of the Communications Act of 1934, as amended, 66 Stat. 715, 68 Stat. 35, 47 U.S.C. §§ 309 (a) and (c), provide as follows:

> Sec. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall contain such allegations of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. The Commission shall, within thirty days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. In any hearing subsequently held upon such application all issues specified by the Commission shall be tried in the same manner provided in subsection (b) hereof, but with respect to all issues set forth in the protest and not specifically adopted by the Commission, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

Section 402 (b) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402 (b), provides as follows:

> Sec. 402. (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> * * * * *
>
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.
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> * * * * *

STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing an opinion and order of the Federal Communications Commission which dismissed a protest filed by Federal Broadcasting System, Inc. (Federal). The protest in question was filed in reliance upon Section 309 (c) of the Communications Act of 1934, as amended, 66 Stat. 715 (1952), 47 U.S.C. § 309 (c), to the grants of the applications of WHEC, Inc. (WHEC) and Veterans Broadcasting Company, Inc. (Veterans) for construction permits for new television stations to share time on Channel 10 in Rochester, New York. These applications had originally been filed on February 17, 1948, and January 22, 1952, respectively. After intervening amendments, they were amended on March 4, 1953, so as to remove any conflict in their proposals. At its next regular meeting, on March 11, 1953, the Commission considered and granted the applications of Petitioners. At that time, there were no applications on file which conflicted with a grant of these two applications.

On March 17, 1953, Federal filed a protest (R. 33-41) to these grants in reliance upon Section 309 (c) of the Communications Act of 1934, as amended, and at the same time tendered a new application for Channel 10 in Rochester. In the protest, Federal alleged that it was party in interest (1) because its application was entitled to comparative consideration with those of Veterans and WHEC, and (2) because, as the licensee of a standard broadcast station in Rochester, it would suffer an adverse economic effect from the grants under the doctrine of *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940). Section 309 (c) of the Act requires that the "facts, matters, and things relied upon" must be specified with particularity by a protestant. With respect to the "facts, matters, and things relied upon" by Federal to show that the grants had not been in the public interest, it was alleged that Federal would be found the superior applicant in a comparative hearing, because WHEC is a subsidiary of a newspaper chain, and because Federal "doubted" that the financial qualifications and unspecified commercial policies of Veterans could withstand the careful scrutiny of a comparative hearing.[1] No issues were specified on

[1] The paragraph containing the substantive allegations of the protest is as follows (R. 39): "Petitioner avers and verily believes that competent testimony submitted at a competitive hearing would disclose that neither WHEC, Inc., nor Veterans Broadcasting Company, Inc., could prevail against petitioner. WHEC, Inc., is a subsidiary of the Gannett Newspaper chain, which has monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in New York and elsewhere, and owns a number of broadcasting stations. Unlike this petitioner, the owners of WHEC, Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of

which Federal stated it wished the Veterans and WHEC applications to be heard. *Federal's only request was for a comparative hearing on all three applications.*

Petitioners filed a reply and motion to dismiss the protest and also moved to have the Federal application for Channel 10 returned to the applicant. The Commission ruled, by Order of April 1, 1953, that Federal's application for Channel 10 was not entitled to comparative consideration, since it had been filed after Petitioners' applications for Channel 10 had been granted (R. 83). After once allowing the protest, the Commission granted a motion to reconsider, and on July 27, 1953, entered an Order denying the protest because of the failure of protestant "to allege with particularity the facts, matters, and things relied upon," as required by Section 309 (c) of the Act (R. 124-129). The protest was found to contain only vague, conclusory arguments, and not the basic facts, stated with specificity, which the statute contemplated should be set forth as a basis for protesting grants under Section 309 (c) (*Ibid*).

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newspapers. It is doubted that the financial qualifications of Veterans Broadcasting Company, Inc., could withstand the careful scrutiny to which they would be subjected at a competitive hearing, and the commercial policies by which they conduct WVET accord neither with accepted practice nor the commitments made as an applicant. Undoubtedly, these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time on Channel 10 and thus avoid a hearing. It is submitted, also, that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing."

Federal's petition for reconsideration of the Commission's Order of July 27 was denied on April 30, 1954 (R. 148-151). The appeal to the Court of Appeals for the District of Columbia Circuit followed.

The Court of Appeals reversed the Commission on the question of whether the "facts, matters, and things relied upon" had been stated with sufficient particularity. It summarily dismissed Petitioners' steadfastly-urged contention that Federal had not met the "party in interest" requirements, by stating in a footnote that (R. 164, Appendix A, *infra*, p. 4a):

> "The Commission held, and we think properly, that Federal was a 'party in interest' entitled to file a protest."

Thus, the lower Court concluded in substance, that the Federal protest met the jurisdictional requirements of Section 309 (c) and that, therefore, the Commission should have ordered a hearing and stayed the grants to Petitioners pending its outcome. At the same time, the Court sustained the Commission in holding that Federal's application was not entitled to comparative consideration with those of Petitioners and that the grants to Petitioners were not void for procedural defects.

No petitions for rehearing were filed with the Court below.

REASONS FOR GRANTING THE WRIT

1. The decision below constitutes an erroneous ruling on an important provision of the Communications Act, which will have an extremely far-reaching

ect on the administration of the Act. Section 309 (c) the Communications Act created a novel right for arties in interest." Unlike other statutory pro- ions that afford a "party in interest" standing to peal to the courts for judicial review of an adminis- tive decision, Section 309 (c) affords standing ore the administrative agency, itself, to require a ring on applications for radio authorizations. rther, during the time that the hearing is in process, l until a final decision, the grant of the application ng protested is automatically stayed and con- uction or operation thereunder is prohibited. Thus, re is, of necessity, a substantial delay in com- ncement, or a serious disruption of the radio service be rendered.

As construed by the Court of Appeals in this case, etion 309 (c) of the Act will permit the successful ng of protests by persons only remotely affected by grant, thus empowering the unscrupulous to delay oadcast service for long periods of time merely to ve personal interests while the public interest ffers. Further, the broad interpretation of the isdictional requisite of "party in interest" adopted the Court below raises a serious constitutional estion in that it establishes a right to judicial review administrative action by the Federal Communica- ns Commission in persons having no legal or equit- e right to protect, contrary to the intent and purpose Article III of the Constitution of the United States. nally, the lower Court, in addition to so liberalizing e "party in interest" requisite as to cast doubt on the nstitutionality of the statute, also has effectively itten out of Section 309 (c) the second jurisdictional

requirement that "protests" state with particularity the "facts, matters, and things relied upon."[2]

It is clear that the Congress, in adopting Section 309 (c), did not intend to open the floodgates to attacks on Commission action by anyone who chose to become a so-called private attorney general. On the contrary, Congress, in adopting this section, undoubtedly intended that only persons with "legitimate interests" would have the right to attack Commission action and set in motion the hearing procedures and automatic stay of the grant required under the section. Thus, the legislative history lucidly indicates that Congress expressly intended to limit the class of persons who might constitute "parties in interest" so that "a host of parties who have no legitimate interest" could not use the newly-adopted section

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[2] The instant case presents a perfect example of the severe consequences of the type of interpretation given Section 309(c) by the Court of Appeals, for if this Court does not review and reverse the decision of the Court below with respect to the validity of the protest, or with respect to the power of the protestant to take an appeal in the instant case, Petitioners will be ordered by the Federal Communications Commission to cease operations on Channel 10. These operations started in November 1953, pursuant to authorizations issued by the Federal Communications Commission, and have continued to date. A capital investment of approximately $750,000 has been made by your Petitioners; payroll expenses of approximately $50,000 per month are involved; local and national network service to approximately 1,000,000 people will be interrupted while a hearing is conducted on the protest; and more than 100 highly trained persons now employed by Petitioners will be forced to look for new employment. Such drastic impact on the public interest, as well as on the interest of Petitioners and their employees, should not be allowed to take effect in the absence of clear, unequivocal and overwhelming reasons, which have not been advanced by Federal.

"solely for the purpose of delaying license grants which properly should be made." (S. Rep. 44, 82nd Cong., 1st Sess., p. 8; 1 Pike & Fischer R.R. 10:279-280).

In sum, Congress recognized that the remedy provided by Section 309 (c) was an extremely unsual and drastic one and, hence, attempted to supply built-in safeguards against its use by those unscrupulous persons who might be tempted to use it solely to delay competition or as a means of effecting a legalized form of extortion. These safeguards were the provisions that (1) a protestant must allege facts showing himself to be a "party in interest" within the meaning of *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940), *i.e.,* he must show that the action protested would result in "substantial and direct" injury to him, and (2) the facts, matters and things relied upon as casting doubt on the propriety of the grant must be stated with particularity, not merely alleged generally.

Despite the contrary intent of Congress and the drastic nature of the remedy afforded, the Court of Appeals has so liberalized the requisites for a valid protest by the decision below as to open a veritable Pandora's box. The result is that, henceforth, all Commission grants of radio or television authorizations bringing new service to the public, and these number in the thousands per month, will be subject to protests *and automatic stays* at the instance of a wide range of persons only remotely affected by a grant, upon the basis of allegations which do not properly present any issue for hearing.[3]

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[3] An example of the far-reaching effect and almost unbelievable potency of Section 309(c), as construed by the Court below, may

2. This petition presents the first opportunity for this Court to construe the phrase "party in interest" as that term is used in this highly controversial and increasingly important statutory provision. Section 309 (c) was adopted by Congress in 1952. The Federal Communications Commission has passed upon 70 protest cases in two years. Twenty-eight per cent of its deliberation time has been spent on such cases and the Commission has viewed this increase in its business with great concern. See, *e.g.*, Hearings Before Committee on Interstate and Foreign Commerce of the

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well serve to illustrate the great need for a review of the case by this Court. Bearing in mind that Section 309(c) applies to grants of industrial radio licenses as well as to those of broadcast and common carrier facilities, it is quite possible that, under the Court of Appeals' interpretation of the "party in interest" and "particularity" requirements, a large telephone company could file protests to every industrial radio grant made by the Commission. In such a protest, the telephone company could, without difficulty, allege that if the private system were not installed, it could be supplying the mobile radio service as a common carrier, and hence it is deprived of revenue and adversely affected by the grant. To meet the other jurisdictional requirement, it need only allege that the applicant was not qualified or eligible to hold a license. Clearly, these allegations would force the Commission to set the grant for hearing and delay its effective date regardless of whether the protest was frivolous or not since this could not be proven except by a full dress hearing. Since most of these industrial radio licensees need radio, but could not afford the high costs of a full dress hearing, most of them would probably withdraw their applications rather than attempt to defend their position. In this way, an effective means of forcing the use of common carrier facilities rather than private ones could be presented by taking advantage of the now liberalized jurisdictional requisites of a 309(c) protest. Such a "protest" case involving a common carrier has already been handled by the Commission so this possibility is far from illusory. *R. J. Laros and Brother*, 11 Pike & Fischer R.R. 355 (1954).

House on H.R. 5614, 84th Cong., 1st Sess., pp. 75-92 (1955); S. Rep. No. 1231, 84th Cong., 1st Sess., pp 6-8 (1955); H. R. Rep. No. 1051, 84th Cong., 1st Sess., pp. 4-6 (1955); 101 Cong. Rec., pp. 9611 and 9614 (daily ed. July 21, 1955). The controversy over this section has not abated. See, *e.g.*, 101 Cong. Rec., pp. 9610-9619 (daily ed. July 21, 1955).

Perhaps the greatest reason why so many of these "protest" cases have reached the courts and more certainly the reason for the Commission's recent entertainment of so many new protests is to be found in the extremely broad interpretation given the term "party in interest" by the Court of Appeals. An excellent illustration of the breadth of the concept as it has been developed by the Court of Appeals is to be found in the recent case of *Clarksburg Publishing Company* v. *Federal Communications Commission*, F. 2d (D.C. Cir. Case No. 12,441, decided June 9, 1955). There, the Court held that a newspaper which had no broadcast interests, but which expected to have to compete with a new television station for advertising revenue, had status as a "party in interest" and was, therefore, entitled to protest under Section 309 (c) and to appeal under Section 402 (b) (2).

The instant case, also, presents an excellent example of how the Court of Appeals has unreasonably liberalized the concept for, in effect, the Court below held that a radio licensee was, *per se*, a "party in interest" insofar as a television grant was concerned. Despite the fact that the entire thrust of Federal's protest was to the effect that it was a "party in interest" because it wanted to be an applicant for

Channel 10;[4] and despite the fact that the Court held unequivocably and correctly that Federal had no status as an applicant since it did not have an application on file when the grants were made; the Court, nevertheless, and without explanation, accepted the identity of Federal as a "party in interest" by reason of the fact that it is the operator of a radio broadcast station in Rochester, New York, and the Petitioners' applications proposed to establish a new television broadcast station in that City. To reach this conclusion, the Court of Appeals had to decide that Federal's simple allegation in its protest that, ". . . both as an applicant for television facilities in Rochester and the licensee of a standard broadcast station in Rochester petitioner [Federal] has an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc., under the doctrine of *Sanders* v. *Federal Communications Commission,* 309 U.S. 470 [sic]," (R. 36) was sufficient to meet the requirement that a showing of direct and substantial injury be made to qualify a person as a "party in interest." Aside from this

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[4] In making the allegation that it was a "party in interest," Federal stated in its protest (R. 36):

> "... first, because the grants do not become final until the expiration of the 30-day period following the grants and petitioner has filed a mutually exclusive application; second, the failure of the Commission to make adequate announcement of the amendments, which made the applications eligible for a grant without a hearing, deprived petitioner of due process; and, third, both as an applicant for television facilities in Rochester and the licensee of a standard broadcast station in Rochester petitioner has an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc., under the doctrine of *Sanders* v. *Federal Communications Commission,* 309 U.S. 470 [sic]."

statement, which is the only one in the entire protest indicating that Federal might be relying on its status as a radio licensee, there is nothing in the protest to show how or why Federal was adversely affected by the grants protested.

Congress could not have intended that a person merely alleging that he has an economic interest "antithetical" to that of another is entitled to interrupt and delay television service to 1,000,000 people. Nor could such a statement be said to meet the test of the *Sanders* case where this Court held that a showing of direct and substantial injury was required. *Cf. National Broadcasting Co.* v. *Federal Communications Commission,* 132 F. 2d 545, 548 (1942), aff'd, 319 U.S. 239 (1943) (Opinion by Rutledge, J.). If the Court of Appeals were correct in such a liberal interpretation of the requirements for "party in interest," then it would appear that a radio licensee in New York could protest the grant of a television permit for a channel in Los Angeles to one who already had a radio station in New York, on the theory that the new grant would enable his competitor to offer a more attractive advertising package to a national advertiser and that, hence, the grant was "antithetical" to the protestant's economic interests. It is submitted that a mere allegation of antithesis is not enough to satisfy the requirements of *Sanders.* In ruling that such a statement is sufficient and that, hence, a radio station licensee is *per se* a "party in interest" for the purpose of protesting a grant permitting another to supply a city with an entirely different type of service—television—the Court of Appeals has completely misconstrued this Court's decision in *Sanders* and has thereby created a precedent of inestimably far-reaching effect in all branches of administrative law. This alone warrants a review by the Supreme Court. See *McCandless* v. *Furlaud,* 296

U.S. 140 (1935); *Upshaw* v. *United States,* 335 U.S. 410 (1948).

3. Even if it were clear that Congress intended by Section 309(c) to permit the classes of persons who may now protest grants under the lower Court's interpretation of "party in interest" to hold up Commission action on applications for new authorizations as indicated, it is also clear that authorizing the constitutional courts to review such action does not present a justiciable case for controversy as is required by Article III of the Constitution of the United States. In *Sanders* (309 U.S. 470), this Court held that a radio station operator who would suffer economic competition from a grant of an authorization to another radio broadcast station operator in his community had standing to appeal under Section 402(b). While the constitutional question was raised in the brief of Petitioner in that case, it was not specifically passed upon or evaluated by the Court. The Court made its ruling as to the right of appeal solely on the basis of statutory interpretation and did not give consideration to whether such an appeal actually met the constitutional case or controversy requirement. In essence, what we have in this case is an appeal by a party that might suffer competition from the authorization granted to Petitioners, raising a question as to the legality of the manner in which Petitioners obtained their authorization. Under *Sanders, supra,* the protestant herein is not entitled to be free from competition from other radio broadcast station operators. It is not contended by protestant that any of his rights, legal or equitable, have been otherwise invaded, impaired, or threatened. The temptation to file a protest, and take an appeal from a denial, for the purposes of delay, since it might delay competition against which protestant is not legally en-

titled to protection, is tremendous; the opportunity to propose a compromise which is a camouflaged form of blackmail is presented; the processes of the Commission are clogged; and the processes, time, and attention of the courts are consumed with the consideration of appeals which actually do not present a case or controversy. If such was the intent of Congress, it is obvious that such intent would be unconstitutional. *Muskrat* v. *United States,* 219 U.S. 346 (1911); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

Mr. Justice Douglas, in dissenting from the decision of the Supreme Court in *Federal Communications Commission* v. *National Broadcasting Company,* 319 U.S. 239 (1943), summarized the argument with respect to the constitutional question involved herein in the following language (319 U.S. at 264-265):

> "I agree with the Court that if as we held in the Sanders case, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869, a person financially injured by the grant of a license has a standing to appeal, so does one whose station will suffer from electrical interference if the license is issued. I expressed my doubts, however, in Scripps-Howard Radio, Inc., v. Federal Communications Commission, 316 U.S. 4, 20, 21, 62 S. Ct. 875, 884, 885, 86 L. Ed. 1229, whether Congress endowed private litigants with the power to vindicate the public interest when it gave the right to appeal under § 402(b) to a person 'aggrieved or whose interests are adversely affected' by a decision of the Commission. I also expressed my concern in that case with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission. See Muskrat v. United States, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246. But if we accept as constitutionally valid a system of judicial review invoked by a

> private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, [footnote omitted] then *I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy.* Federal Radio Commission v. General Electric Co., 281 U.S. 464, 50 S. Ct. 389, 74 L. Ed. 969. [Emphasis supplied.]

It is submitted that the touchstone of "immediate and substantial" injury is the key to the validity of the "party in interest" concept. Where the requirement for a showing of such injury is dispensed with, as was done by the Court below, it is further submitted that the Court has so construed the statute in question as to raise serious doubts regarding its constitutionality. For this reason, also, review is proper so that this Court may reconstrue the "party in interest" provision so as to bring it back within the *Sanders* doctrine and remove the stigma of unconstitutionality which must otherwise inevitably arise. See *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50 (1950).

4. Finally, it is submitted that review must be given here for the reason that the Court has not only opened the door for skullduggery by enlarging the "party in interest" concept, but has also seen fit to all but eradicate the only other jurisdictional ground on which frivolous protests might be discouraged. Congress recognized that the new remedy under which grants found by the Commission to be in the public interest may be "stayed" at the instance of a protestant is drastic in nature. It, therefore, wisely restricted the

remedy by providing that a protest must set forth *with particularity* the facts, matters, and things relied upon. The category of persons who are parties in interest has been liberally construed and includes an existing station in whose interest it is to delay the advent of new services which it considers to be competitive to its existing authorization. The present position of the Court of Appeals, in eradicating the second qualifying jurisdictional factor of Section 309(c), will make it doubly easy for such parties to delay new grants for an indefinite period of time pending the holding of hearings where it is clear that the grant is in the public interest and no matters have been alleged which raise any proper issue for hearing.

The impact of the decision below upon both the public interest and the proper functioning of the Commission's processes is evidenced from an examination of the facts of the instant case. Two applicants, who had filed their applications prior to the lifting of the television "freeze" in April, 1952, finally resolved their conflict in March, 1953, and filed amended applications to share time on the channel both had requested. During all of this, when the backlog of applications on a great number of mutually exclusive applications had prevented an early hearing on the Veterans and WHEC applications, no other applicants had filed for Channel 10. When the amended applications of Petitioners were filed, the Commission considered them and found both applicants to be fully qualified to serve the public interest. The applications contained full information on the applicants' programming plans and their technical, legal and financial qualifications. Although the Commission had already found the applicants to be qualified, and despite the requirement

for particularity in Section 309(c) before a grant is to be postponed and a hearing held, Federal did not allege with particularity *any facts* showing why the grants were not in the public interest. Instead, it argued that if its own late-filed application were given a comparative hearing with those previously granted (something that the Court of Appeals held Federal was not entitled to even if the protest were granted), it could show its *comparative* superiority. The protest alleged no facts tending to show that Veterans was not financially qualified or that the ownership of WHEC by a newspaper publisher disqualified it to operate in the public interest.

Section 309(c), like the requirement of specificity in pleading fraud under the Federal Rules of Civil Procedure,[5] is not satisfied by general allegations which amount to conclusions and are not full particularizations of relevant facts and circumstances. See *New York, N.H. & H. R. Co.* v. *New England Forwarding Co.*, 119 F. Supp. 380 (D.C. Rhode Island 1953); *Connor* v. *Real Title Corp.*, 165 F.2d 291, 294 (4th Cir. 1947); *Crummer Co.* v. *DuPont*, 117 F. Supp. 870, 875-876 (N.D. Fla. 1954)).[6]

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[5] See Federal Rules of Civil Procedure, rule 9(b), 28 U.S.C. following section 723c, which requires that in averments of fraud, "the circumstances constituting fraud * * * shall be stated with particularity."

[6] The decisions cited by the lower Court (Appendix A, *infra* p. 4a, n. 3) as a basis for its ruling do not relate to situations where specificity of pleading is required. They relate to parts of the Federal Rules where liberality of pleading is the rule. The section of the Communications Act here in question offers a very drastic remedy and, hence, it is clear that any pleading analogy drawn must relate to parts of the Federal Rules—such as the fraud rule—where strict specificity is required, and not to parts like Rule 15 where liberality is obviously contemplated.

This is particularly true where the allegations were not directed to the question of whether the protested grants were in the public interest, but were made in connection with an argument that even if Petitioners were qualified, Federal believed itself to be a *superior* applicant. The Commission cannot deny a qualified applicant because some other party, who does not have an application on file entitled to comparative consideration, might believe himself better qualified.

Section 309(c) applies to all broadcasting licenses, including the numerous non-broadcast, safety and special services. Thousands of grants are made each month, covering the entire range of the use of radio signals in modern society. In imposing the stringent requirements of particularity, which are unusual in administrative proceedings, Congress was not concerned with mere niceties of pleading. It was concerned that the Commission's processes not be disrupted, and grants not be held up, by parties who could not fully present relevant facts justifying the demand for a hearing. The ultimate protection of the public interest rests with the Commission, and, while it is important that substantial questions be heard, it is also important that those with an adverse economic interest not be permitted to clog the administrative process, or the judicial process, in a manner contrary to the interests of the public. The wise restrictions with which Congress safeguarded the drastic protest remedy should be adhered to strictly. Impairment of these restrictions will have a far-reaching adverse effect on the future efficient administration of the Communications Act. If the decision below is permitted to stand, all grants made without hearing will be subject to needless delay and unnecessary hearings. We submit that the question of compliance with the

requirements of Section 309(c), while narrow in scope, is one of broad significance and that the decision below warrants review by this Court.

CONCLUSION

The decision below misconstrues Section 309(c), thus opening the door to a flood of improper protests, and places an unconstitutional interpretation upon Section 402(b)(2) in permitting judicial review of an administrative act by one who has no legal or equitable rights in the act being complained of. It is respectfully submitted that the Petition for Certiorari should be granted.

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October .., 1955.

APPENDIX

APPENDIX

APPENDIX A

(Filed July 28, 1955)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12252

FEDERAL BROADCASTING SYSTEM, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

WHEC, INC., *Intervenor*,

VETERANS BROADCASTING COMPANY, INC., *Intervenor*.

Appeal from the Federal Communications Commission

Decided July 28, 1955

Mr. William A. Roberts, with whom *Mr. E. D. Johnston*, *Mrs. Irene Kennedy* and *Mr. Julian P. Freret* were on the brief, for appellant. *Mr. Morton R. Galane* entered an appearance for appellant.

Mr. Warren E. Baker, General Counsel, Federal Communications Commission, with whom *Messrs. J. Smith Henley*, Assistant General Counsel, Federal Communications Commission, *Daniel R. Ohlbaum* and *Warren D. Quenstedt*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Messrs. Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, and *Stanley S. Neustadt*, Counsel, Federal Communications Commission, also entered appearances for appellee.

Mr. Thomas H. Wall, with whom *Messrs. Thomas W. Wilson, Jerome H. Heckman, Frank U. Fletcher* and *Frank Roberson* were on the brief, for intervenors. *Mr. Alfred C. Cordon, Jr.*, entered an appearance for intervenor WHEC, Inc.

Before PRETTYMAN, FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case involves a protest against the grant of a television permit (license) for Channel 10 in Rochester, New York, to the intervenors WHEC, Inc. (WHEC) and Veterans Broadcasting Co., Inc. (Veterans). The principal questions raised are whether the Commission's accelerated procedures were valid, and whether it acted properly in dismissing a protest for lack of specificity.

In 1952 WHEC and Veterans filed mutually-exclusive applications for the Channel 10 television license in Rochester. These applications were due to be heard on a competitive basis. In early March of 1953, however, WHEC and Veterans entered into a share-time agreement for the use of Channel 10 and thus resolved the conflict between their applications. On March 4 and 5, 1953, respectively, they amended their applications accordingly. On March 9, 1953, the Commission accepted the amendments for filing and gave public notice of its action. At its next meeting on March 11, 1953, the Commission granted intervenors the Channel 10 television permit for share-time operation.

Federal Broadcasting System, Inc. (Federal), protestant before the Commission and appellant here, is the licensee of standard broadcasting station WSAY in Rochester, New York. At the time when the above-described proceedings in regard to the Rochester Channel 10 television license took place, it was not an applicant for that license. Appellant tells us that it had intended to file an application for the Channel 10 license, but had been prevented from completing

its technical data by difficulty in obtaining a suitable antenna site. Six days after the Commission's grant to the intervenors, Federal filed its application for Channel 10. Simultaneously it filed a protest, under Section 309(c) of the Federal Communications Act, 47 U.S.C. § 309(c) (1952), against the grant to intervenors.

Acting on Federal's protest the Commission suspended the intervenors' permit and set Federal's protest for hearing on issues to be framed by subsequent order. The intervenors objected to the protest on the ground that Federal was not a "party in interest" and had not specified "with particularity the facts, matters and things relied upon." On July 27, 1953, the Commission reversed itself and dismissed the protest on the latter ground. It also returned Federal's application for a television license on Channel 10.

On August 18, 1953, Federal filed a petition for reconsideration, relying on newly-found facts relative to the alleged invalidity of the Commission proceedings of March 11, 1953.

On May 3, 1954, Federal's petition for reconsideration was denied both on the ground that the Commission could not act on facts presented after the expiration of the 30-day period allowed for filing a protest under 47 U.S.C. § 309(c) (1952), and that the facts set forth in Federal's petition for reconsideration, if considered on the merits, did not constitute a reason for reinstating Federal's protest. This appeal followed.

I.

The primary issue before us is, of course, whether the Commission erred in its treatment of Federal's protest against the grant made.

Section 309(c), under which the protest was filed, was added to the Act by the 1952 revisions. It was an expression of Congressional desire to guarantee interested

parties an opportunity to be heard where Commission action was taken without a prior opportunity for voicing opposition. This was an innovation. However, in thus opening the door to protestants, Congress required that the protest *"shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally."* (Italics added.) 47 U.S.C. § 309(c) (1952). It was this requirement that the Commission held was not satisfied by Federal's protest.[1]

It is clear from a reading of the statute and its history that Congress sought to require one protesting a unilateral grant of a license by the Commission to show in some detail the factual basis of his grievances.[2] Generalized objections are obviously insufficient under the statute without some specification of events and circumstances. But neither are we to measure the requirement of Section 309(c) by the technicalities of pleading formerly applicable in civil litigation. What is required is merely an articulated statement of some fact or situation[3] which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding.

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[1] The Commission held, and we think properly, that Federal was a "party in interest" entitled to file a protest.

[2] "Provisions also are included which are designed to guarantee that any hearings held before the Commission upon any application will be conducted upon the basis of issues clearly defined so that the Commission will act as an arbiter." S. Rep. No. 44, 82d Cong., 1st Sess., p. 8 (1951).

[3] Compare Christianson v. Gaines, 85 U.S. App. D.C. 15, 174 F. 2d 534 (1949); Shotkin v. General Electric Co., 171 F. 2d 236 (10th Cir. 1948); Fleming v. Dierks Lumber & Coal Co., 39 F. Supp. 237 (W.D. Ark. 1941).

Read in that light it seems clear to us that appellant's protest raises at least one issue with sufficient particularity to require that a hearing on the protest be granted. That is the issue of threatened monopoly control of mass media of communications in the Rochester area. The protest in that regard avers that the intervenor WHEC is a subsidiary of the Gannett Newspaper chain which has a monopoly of the daily newspapers in the City of Rochester, owns other standard broadcasting stations both in Rochester and elsewhere and controls numerous newspapers outside Rochester. A list of Gannett enterprises is set forth as part of the protest, showing the extent of the Gannett radio and newspaper chain in upstate New York, which includes the Rochester area.[4] Appellant further asserts that the Gannett newspapers, "obviously" because of their ownership of Station WHEC, have treated appellant's Station WSAY unfairly in regard to publicity coverage of the latter's radio programs and thus have caused it financial loss beyond what would have been the result of ordinary competition between the two radio stations. Federal also stated that the newspaper chain operating WHEC engages in broadcasting "as a business activity secondary to their principal business, the publishing of newspapers."

In our view, these allegations clearly "specify with particularity the facts, matters, and things relied upon," and the Commission erred in holding the contrary. Nor can it be said that the issue so raised is frivolous or immaterial. On the contrary, this court's recent decision in *Clarksburg Publishing Co.* v. *Federal Communications Commission*, — U.S. App. D.C. —, — F. 2d — (decided

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[4] This list actually is Appendix A to appellant's reply to the motion to strike the protest made by intervenors. This document was received by the Commission April 1, 1953, within the 30-day protest period set by Section 309 (c) and running from March 12, 1953. Factual matter contained in such a document can clearly be considered as part of the protest in evaluating compliance of the protest with the particularity requirement of the same section.

June 9, 1955), shows its importance. And the fact that Federal raises the isue as part of its effort to show its own comparative superiority does not diminish the public interest involved in the matter.

Federal's protest went further than to raise the issue just mentioned. It went on to say that (1) Federal was surprised by the sudden action of the Commission in granting the WHEC and Veterans license; it could not have anticipated such action because up to March 4, 1953, the application of the grantees had been mutually exclusive: in consequence, the Commission should waive its rules with regard to the filing of applications prior to action by the Commission, and allow Federal's application to be filed as an application mutually exclusive with that of WHEC and Veterans. Federal alleges that the Commission acted too speedily in making the protested grant and acted under internal proceedings unknown to Federal or to the public and without reasonable notice of the change in the status of the applications of WHEC and Veterans. (2) The operation of both stations through a joint transmitting plant involves legal and practical questions which were never fully considered by the Commission. Use of a television station by one operator gives, Federal says, superior service. Federal also predicts that intervenor WHEC will buy out the interest of the other intervenor Veterans in the proposed joint television station, through furnishing no facts to sustain this allegation. (3) Federal "doubts" that the financial qualifications of Veterans could withstand the careful scrutiny to which they would be subjected at a competitive hearing, and asserts that "the commercial policies by which they conduct [standard broadcasting station] WVET accord neither with accepted practice nor the commitments made as an applicant"; that Veterans has had "financial difficulties in which one of the Rochester banks became involved to the extent of $100,000 or more" and that the bank brought pressure on merchants to adver-

tise with WVET; and that other "commercial tactics of WVET have been of such a character that petitioner prefers to operate unprofitably rather than to degrade its programs through adoption of such questionable practices."[5]

We need not here consider whether each of these additional allegations, taken separately, is stated with sufficient particularity. For, as we said in *Clarksburg*, once a protestant—as here—has shown sufficient grounds to require the holding of the hearing prescribed by Section 309(c) of the Act, the Commission is free to consider any issue bearing on the qualifications of the licensee or the required finding of public interest, convenience and necessity; it is not limited to issues raised by the protestant. In the present case the Commission should not conclude its hearing until it has built up a record sufficient to support its final conclusions. The speed with which it made its grant to the intervenors seems to us to require that it now act with particular care in its re-examination of the matter. That re-examination should include an appraisal of the arrangement for joint operation by the intervenors, with reference not only to its effect on programming but also to the circumstances surrounding the amendment of the original applications and the initiation of the joint project. See *Clarksburg, supra.*

II.

For the reasons given, we think that a broad reopening of the case is called for by appellant's protest. The question remains: at the forthcoming proceeding, is the Commission bound to give appellant a comparative hearing on its application? Appellant asks us to answer this question in the affirmative.

It is clear, of course, that the protest procedure is not, as such, designed to develop comparative considerations.

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[5] These last two allegations appear in Federal's reply to the motion to strike its protest. See note 4, supra.

It is one designed to vindicate the public interest through an examination of alleged defects in the outstanding grant. Here, if the Commission ultimately sets aside the grant to the intervenors, after holding a hearing on the protest, it will be open to appellant to file an application which will be entitled to consideration along with any other for the same channel. But appellant goes farther: it argues that it is presently entitled to a comparative hearing. Its position, in essence, is that the Commission's grant of a license to the intervenors is completely lacking in validity or effect: in its view, the channel is still open for assignment.

Appellant first contends that the Commission's grant to intervenors is invalid, as not being based on the votes of a majority of the Commission. The minute of the Commission's March 11 meeting shows that Commissioner Hennock objected to the entire procedure there followed, because she felt that it failed to safeguard the interests of the public and of other prospective bona fide applicants who were given no notice of the sudden acceleration of the Commission's normal processing activities. (J.A. 134-5) When the Rochester applications were reached, Commissioner Merrill asked that they be passed over for his further study. The majority of the Commissioners did not accede to his request, although Commissioner Merrill stated that such a request had in the past always been respected. When the vote was taken on the grant of a license to the intervenors three Commissioners voted in favor of the application, two Commissioners voted to pass over and Commissioner Hennock did not participate. At a meeting of the Commission held on the following day a motion was made to reconsider the grant of the Rochester license application, but was defeated.[6]

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[6] Federal excused its delay in presenting these facts as part of its original protest by its inability to secure, prior to August 1953, a copy of the minute of the Commission's March 11 meeting.

Appellant here renews its argument before the Commission that we should construe the vote taken on the intervenors' applications for a license at the March 11, 1953, meeting of the Commission as a tie vote, counting Commissioner Hennock's absence as a negative vote in view of her dissent. However, the Commission's minute, duly approved by it and now urged upon us as valid by the Commission's counsel, shows a vote of three Commissioners in favor of the application, with two Commissioners opposed out of a total of five Commissioners voting, one Commissioner being absent when the vote on the Rochester application was taken. Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting.

Secondly, appellant complains of the procedures by which the Rochester television applications were brought before the Commission for action on March 11, 1953. It cannot point to any specific provision of the Commission's rules which was contravened. On the contrary, it concedes that Section 1.382(b) of the Rules required that an application, to be considered as mutually exclusive with applications already on file, must be filed not later than the close of business on the day preceding the day on which the Commission takes action with respect to applications previously filed. Appellant's application was not so filed. Further, there was no rule in effect barring the Commission from promptly considering applications which had become ripe for action, or compelling their consideration in any particular order.[7] But appellant argues that the Commission acted with undue speed, under procedures unknown to Federal or the public, and without reasonable notice of the change in status of the pending applications of WHEC and Veterans.

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[7] In fact, the Commission had already decided to take up these applications at its next meeting.

Were the procedural changes adopted by the Commission arbitrary in the sense that they cumulatively amounted to a violation of due process? To answer this question requires some consideration of the background against which the Commission's action was taken. Because of the overwhelming burden of processing and hearing contested television license applications the Commission, in May 1952, had temporarily discontinued the processing of these applications and had continued processing only those cases where a single applicant sought a license for a particular television channel. Since May 1952 numerous additional applications had become uncontested and, to dispose of them as speedily as possible, the Commission decided on March 4, 1953, to place such applications on its agenda for March 11, 1953. Including the Rochester applications, 48 applications in this class were slated for action on March 11. The Commission also decided to proceed on March 11 without the written presentation normally foreseen by its rules[8] and to act on oral staff statements as to the qualifications of the applicants. Since the Commission considered that these applications did not require a comparative hearing any more than applications at all times uncontested, it decided on March 4, 1953, to make a dent in this part of its backlog by the procedure outlined.

Insofar as the choice of this method involved internal procedural changes the Commission under Section 4(i) and Section 4(j) of the Act[9] had the power to issue such orders as were necessary in the exercise of its duties and

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[8] The Commission's rule, 47 C.F.R. § 1.372 (1953), obviously contemplates, though it does not expressly prescribe, the preparation of such reports *in writing*. Appellant here complains, *inter alia*, of the omission of written reports.

[9] 47 U.S.C. § 154(i) and (j) (1952), providing in relevant part as follows:

> "(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not incon-

to conduct its business in such manner as would best serve both proper dispatch of business and the ends of justice. We cannot say that the Commission's deviation from its usual procedure, and grants made thereunder, exceeded its powers. Cf. *Norris and Hirshberg* v. *Securities and Exchange Commission*, 82 U.S.App.D.C. 32, 163 F.2d 689 (1947); *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *Bethlehem Steel Co.* v. *N.L.R.B.*, 74 App.D.C. 52, 120 F.2d 641 (1941).

After a short period of experimentation and consideration, this additional procedure for dealing with uncontested applications was formally approved by the Commission and the step from *ad hoc* action to general rule making taken.[10] Certainly such a matter was primarily within the Commission's "informed discretion," *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947), and is not open to the broad challenge made by appellant here.

But to recognize the primary role of the Commission in governing its own procedures does not mean that we are oblivious of the dangers of accelerated procedures which might sacrifice the careful performance of the Commission's substantive tasks to mere speed. See *Clarksburg, supra.* Speed of Commission action may in some cases point to a failure to make those essential findings which the agency must make under Section 309(a) of

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sistent with this chapter, as may be necessary in the execution of its functions.

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . ."

[10] See FCC Order 53-627 amending subparagraph (m) of footnote 10 of Section 1.371, dated May 25, 1953, 18 FED. REG. 3068, as further amended by FCC Order 53-889, July 17, 1953, 18 FED. REG. 4378, and FCC Order 54-1305, Oct. 21, 1954, 19 FED. REG. 6881, substituting therefor § 1.378, 47 C.F.R. § 1.378.

the Act[11] before it grants a requested license. And any perversion of the Commission's administrative processes for an improper purpose would call for administrative relief, or, if that is not granted, for judicial correction—presumably injunctive in nature. But no such situation is here alleged. In this court appellant states that it had intended to file an application for a television license but had been prevented from completing its technical data because of difficulty in obtaining a suitable antenna site. The Commission was hardly compelled to wait for the resolution of this obstacle, even assuming that it knew of it.[12]

The cases relied on by appellant do not lead to a different conclusion. *United States* v. *McGrath*, 181 F.2d 839 (2d Cir. 1950), dismissed as moot, 340 U.S. 940 (1951), a phase of the celebrated *Knauff* case, involved an administrative denial of a stay of deportation. It was deemed proven for purposes of decision on appeal that in all instances without exception such a stay was granted pending congressional action, once a bill had been offerred. A judicial stay was, therefore, granted by the court. But no such situation is involved here. Here the exceptional treatment accorded to the Rochester applications was proposed to be granted to 47 other television applications, in an effort by the Commission to speed up the disposition of applications where a contest had ceased to exist. The Commission's approach to the problem of disposing of this backlog of uncontested television applications certainly cannot be considered as equivalent to a single arbitrary exception in the handling of pending applications. The Commission is not bound to adhere to a procedure just because it was once adopted. *Cf.*

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[11] 47 U.S.C. § 309(a) (1952).

[12] In 1948, appellant's station WSAY wired the Commission protesting the refusal of station WHAM to share its television transmission site with WSAY. The matter was not pressed, and was certainly stale by 1953.

Churchill Tabernacle v. *Federal Communications Commission*, 81 U.S.App.D.C. 411, 160 F.2d 244 (1947).

United Detroit Theatres Corp. v. *Federal Communications Commission*, 85 U.S.App.D.C. 239, 178 F.2d 700 (1949), is even less applicable. It holds that a single application may not be arbitrarily held up. We found in that case that the need for certain investigations under Commission policies required that consideration of the application be postponed. In the instant case appellant had no application pending which was held up arbitrarily. The Rochester applications were processed with dispatch. Perhaps some other applicant could argue that taking up the Rochester applications ahead of others on the list caused prejudice to him. But appellant—not such an applicant—is not in a position to rely on this argument.

Nor does appellant's challenge to the Commission's procedure fare better insofar as it relies on Section 3(a) of the Administrative Procedure Act.[13] The only penalty provided in that section is that no person shall be required to resort to any agency procedure not duly pub-

[13] 5 U.S.C. § 1002(a) (1952):

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

lished in the Federal Register. Appellant was not compelled to resort to procedure not published.

We conclude, therefore, that the Commission's proceedings—whether or not subject to criticism—were not so infirm as to require departure from the well-established rule that a late-filing applicant is not entitled to a comparative hearing. *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S.App.D.C. 160, 177 F.2d 40 (1949); *Telegraph Herald Co.* v. *Federal Radio Commission*, 62 App.D.C. 240, 66 F.2d 220 (1933); cf. *Yankee Network* v. *Federal Communications Commission*, 71 App. D.C. 11, 107 F.2d 212 (1939).[14]

III.

Appellant also urges on us as illegal the rejection of the petition for reconsideration on the ground that the Commission could not properly consider as part of a protest newly-discovered matter first set forth after the end of the 30-day period for filing a protest. Appellant claims that to the extent that the two applicable sections of the Federal Communications Act are in conflict, Section 405[15] supersedes the shorter limitation contained in Section 309(c), insofar as rehearings are concerned. We need not resolve this alleged conflict, since the Commission's Order of May 3, 1954, denying reconsideration of Federal's protest, in fact gave full consideration to the new matter alleged by appellant. The question is thus moot.

Reversed and remanded for further proceedings consistent with this opinion.

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[14] The Commission's practice conforms to this rule. T. E. Allen & Sons, Ins., 9 Pike & Fischer RR 197 (1953). Appellant relies on Western Air Lines, Inc. v. Civil Aeronautics Board, 196 F. 2d 933 (9th Cir. 1952), and United Air Lines v. Civil Aeronautics Board, 198 F. 2d 100 (7th Cir. 1952). But these cases involved proceedings for the suspension of one air carrier and substitution of another on an existing route, a situation which has no application to the instant appeal.

[15] 47 U.S.C. § 405 (1952).

Filed July 28, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955.

No. 12,252

FEDERAL BROADCASTING SYSTEM, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WHEC, INC., *Intervenor,*

VETERANS BROADCASTING COMPANY, INC., *Intervenor.*

Appeal from the Federal Communications Commission

Before PRETTYMAN, FAHY and WASHINGTON, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this Court that the order of the Federal Communications Commission on appeal in this case be, and the same is hereby, reversed, and that this case be, and it is hereby, remanded to the said Federal Communications Commission for further proceedings consistent with the opinion of this Court.

Dated: July 28, 1955.

Per Circuit Judge Washington.

APPENDIX B

Memorandum Opinion and Order

(Allowing protest and designating applications for hearing)

By the Commission: Commissioner Bartley Concurring and issuing a Statement; Commissioner Merrill not participating.

1. The Commission has before it for consideration (a) a protest filed on March 17, 1953, pursuant to Section 309(c) of the Communications Act, as amended, by Federal Broadcasting System, Inc., licensee of Station WSAY, Rochester, New York, directed against the Commission's action of March 11, 1953, granting without a hearing the above-entitled applications; and (b) a "Reply and Motion to Strike 'Protest to Grant of Applications, and Request for Hearing' and Motion to Return Application of Federal Broadcasting System, Inc. to Applicant," filed on March 27, 1953, by the above-entitled permittees.[1] Attached hereto, as "Appendix A" is a copy of Section 309(c) of the Communications Act.

2. To place the facts in their proper perspective, it is necessary to set forth the matters leading to the action taken by the Commission on March 11, 1953. Prior to March 4, 1953, the applications of WHEC, Inc. and Veterans Broadcasting Company, Inc. for a construction permit for a new television broadcast station to operate on Channel 10 at Rochester, New York, were mutually exclusive and they were the only applications on file for that channel. On March 4, 1953, WHEC, Inc. and Veterans Broadcasting Company, Inc. filed amendments to their applications which, among other things, requested permission to share time with one another in the use of the station proposed by each. The Commission, on March 9,

[1] On March 31, 1953, protestant filed a reply to the Motion to Strike Protest.

1953, released a Public Notice (Report No. 4464) which advised, among other things, that the above-mentioned amendments had been accepted for filing. On March 11, 1953, the Commission granted the above-entitled applications, both to operate on Channel 10 on a share-time basis. No other applications for Channel 10 were pending at the time of the Commission's action. It is to be noted that protestant, on March 17, 1953, tendered for filing its application for a new television broadcast station to operate on Channel 10 at Rochester.

3. In support of its protest, protestant asserts that it is a party in interest within the meaning of Section 309(c) of the Communications Act of 1934, as amended, "first, because the grants do not become final until the expiration of the 30-day period following the grants and petitioner has filed a mutually exclusive application; second, the failure of the Commission to make adequate announcement of the amendments, which made the applications eligible for a grant without a hearing, deprived petitioner of due process; and, third, both as an applicant for television facilities in Rochester and the licensee of a standard broadcast station in Rochester, petitioner has an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc. under the doctrine of *Sanders* v. *Federal Communications Commission*, 309 U.S. 470." Protestant states that difficulties in obtaining a satisfactory transmitter site prevented it from filing many months ago an application for Channel 10 at Rochester. It is urged that since the above-entitled applications were mutually exclusive "under Commission procedure there was no reason to expect a final decision or a hearing on either application for many months, perhaps years." It is further asserted that "because of the lack of public notice by the Commission of the tender of the amendments specifying a sharing-time arrangement for the stations proposed by WHEC and Veterans until scarcely 40 hours before the grant of the applications, peti-

tioner had insufficient time to complete the application then in preparation." Protestant recites that it is aware of the provisions of Section 1.382(b) of the Commission's Rules which require that to be considered mutually exclusive with applications on file an application must be filed not later than the close of business on the day preceding the day on which the Commission takes action.

4. In their joint opposition to the protest of Federal Broadcasting System, Inc., WHEC, Inc. and Veterans Broadcasting Company, Inc. urge, in substance, that Federal is not a party in interest under the *Sanders* case since its naked allegation that as a radio station licensee it will be economically injured by the grant of a television application does not confer standing upon it; that Federal cannot assert that it had insufficient notice that the amendments to the subject applications had been filed, for the Commission is not required to set aside amended applications for a protracted period of time to await the filing of competing applications; that Federal has no standing to complain of the grant of the subject applications as an applicant because it was not an applicant for the channel at the time of the grants, and it cannot now claim rights to a comparative hearing under a theory that "because a grant remains subject to protest for a period of thirty days an application filed subsequent to the grant (but within the thirty days period) is entitled to comparative consideration with the application which has been granted"; and that Federal does not meet the requirements of Section 309(c) in that it does not specify with particularity the facts, matters and things relied upon in support of its protests.

5. In light of the fact that protestant is the licensee of a standard broadcast station in Rochester and that it asserts that it has "an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc., under the doctrine of *Sanders* v. *Federal Communications Commission*, 309 U. S. 470,"

we are of the view that protestant is a party in interest within the meaning of Section 309(c). *In re Application of Versluis Radio and Television, Inc.*, FCC 53-314, adopted March 23, 1953. We base our decision on the consideration just stated and not on any other allegation made by the protestant.

6. We have decided above that protestant, alleging economic injury as a licensee of a standard broadcast station in Rochester, has standing herein as a party in interest. However, we think that protestant, when it requests that the subject applications be designated for hearing in a consolidated proceeding with its application, misconceives the purpose and requirements of Section 309(c). Section 309(c) does not say that upon the filing of a protest which meets the requirements of that section, the Commission's action will be vacated or set aside; Section 309(c) provides that "the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing." Cf. *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40.

7. Accordingly, in view of the foregoing, IT IS ORDERED, THAT, effective immediately, the effective date of the grants of the above-entitled applications is postponed pending final determination by the Commission with respect to the protest of Federal Broadcasting System, Inc., and that pursuant to the provisions of Section 309(c) of the Communications Act, as amended, said applications are designated for hearing at a time and place, and upon appropriate issues, to be designated by further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ T. J. SLOWIE

(Seal) T. J. Slowie

Secretary

*Concurring Statement of Commissioner Bartley

In light of the action of the Commission in the Versluis case to which I dissented it would be futile for me to continue to object to interventions on the grounds of economic injury. Therefore, I have joined the majority in this matter.

Adopted: April 1, 1953
Released: April 3, 1953

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Memorandum Opinion and Order

(Granting petition for reconsideration and denying motion for consolidation)

By the Commission: Commissioner Hennock dissenting; Commissioner Bartley not participating.

Preliminary Statement

1. The principal question before us is whether we should reconsider our action of April 1, 1953, in which, pursuant to the provisions of Section 309(c) of the Communications Act, as amended, we postponed the effective date of the grant without hearing of the above-entitled applications of Veterans Broadcasting Company, Inc. (Veterans) and WHEC, Inc. (WHEC) for share-time operation on Channel 10 at Rochester, New York, and designated these applications for hearing. The pleadings relating to this question are set forth in the footnote below.[1]

2. The two applications, prior to March 4, 1953, were mutually exclusive but had not been designated for hearing.

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[1] Federal's Motion for Modification of Order and/or for Consolidation of Applications, filed April 20, 1953; Petition for Reconsideration filed by WHEC and Veterans on April 28, 1953; Response of Chief, Broadcast Bureau to Motion for Modification of Order, filed May 4, 1953; Federal's Opposition to Petition for Reconsideration, filed May 5, 1953; Response of Chief, Broadcast Bureau to Petition for Reconsideration, filed May 11, 1953.

On March 4, 1953, WHEC and Veterans filed amendments to their applications which, among other things, requested permission to share time with one another in the use of the station proposed by each for operation on Channel 10, and on March 9, 1953, the Commission released a public notice which, in addition to other things, advised that the amendments had been accepted for filing. The amended applications were granted without hearing on March 11, 1953, at which time no other application for the use of Channel 10 in Rochester was pending. Thereafter, on March 17, 1953, Federal Broadcasting System, Inc. (Federal), licensee of Station WSAY, Rochester, filed its protest against the grants without hearing.

3. In the Memorandum Opinion and Order of April 1, 1953 (released April 3) the Commission considered the protest, and the joint opposition thereto filed by Veterans and WHEC. It was concluded that protestant, having alleged economic injury as a licensee of a standard broadcast station in Rochester, is a party in interest. Federal's request that its application for Channel 10 (filed at the same time as the protest) should be designated for hearing in a consolidated proceeding with the applications of Veterans and WHEC was rejected by the Commission. The Memorandum Opinion and Order, although containing no discussion of or evaluation of the facts, matters and things relied upon by Federal in support of its protest, designated the applications for hearing at a time and place, and upon appropriate issues, to be designated by further order of the Commission.

PETITION FOR RECONSIDERATION

4. The subject petition for reconsideration of the Commission's action on the protest was filed by WHEC and Veterans on April 28, 1953. Several reasons for reconsideration are therein given, but we find it necessary to consider only one of them. This argument, which was set

forth in petitioners' Reply to the Protest and reiterated in the instant petition, is that Federal, in its protest, failed to comply with the requirement of Section 309(c) that the protestant "shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally."

5. A re-examination of the Federal protest indicates that the only statement of facts, matters and things relied upon, aside from those relating to the question of party in interest, is that contained in paragraph 9 thereof. It reads as follows:

> "Petitioner avers and verily believes that competent testimony submitted at a competitive hearing would disclose that neither WHEC, Inc., nor Veterans Broadcasting Company, Inc., could prevail against petitioner. WHEC, Inc., is a subsidiary of the Gannett Newspaper chain, which has monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in New York and elsewhere, and owns a number of broadcasting stations. Unlike this petitioner, the owners of WHEC, Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of newspapers. It is doubted that the financial qualifications of Veterans Broadcasting Company, Inc., could withstand the careful scrutiny to which they would be subjected at a competitive hearing, and the commercial policies by which they conduct WVET accord neither with accepted practice nor the commitments made as an applicant. Undoubtedly, these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time on Channel 10 and thus avoid a hearing. It is submitted, also, that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing."

6. We think it is clear that such a statement fails to comply with the statutory requirements. As we stated

in our decision in *T. E. Allen & Sons, Inc.* (FCC 53-816) and *Salinas Broadcasting Corporation* (FCC 53-817), both of which were released July 1, 1953, the clear import of the statutory requirement is "that a protestant must do something more than set forth in his protest vague, nonspecific conclusionary arguments; he must allege those facts upon which his conclusions as to the impropriety of the Commission's grant without a hearing are predicated. These facts must be stated with specificity; they must be concrete, basic facts." Reappraising the protest with the foregoing in mind, we have been unable to find anything more than "issues or allegations phrased generally." The mere expression of doubt, the vague allegation of "weaknesses," the irrelevant contention that the grantees could not "prevail" in a comparative proceeding, which this is not, and the assertion of unspecified legal and factual questions requiring consideration at a hearing do not constitute the type of clear, explicit, factual statement required by the provisions of Section 309(c). Accordingly, it is our opinion that the Federal pleading did not state facts sufficient to constitute a protest within the meaning of Section 309(c) and that the effective date of the grants to WHEC and Veterans should not have been postponed.

7. We have also examined Federal's reply to the WHEC-Veterans motion to strike the protest. This pleading was filed on March 31, 1953, one day before the expiration of the fifteen-day period allowed by Section 309(c) for the consideration of protests and one day prior to adoption of our April 1, 1953 Memorandum Opinion and Order. Aside from the fact that, under these circumstances, we are of the opinion that the pleading, which endeavored to correct alleged deficiencies in the original protest, was not entitled to consideration, we are convinced that the data contained therein did not correct the inadequacies in the statement of facts, matters and things relied upon. This conclusion is further substantiated when it is noted that Federal concedes in this pleading that its purpose is to obtain a

comparative hearing between itself and WHEC and Veterans. Section 309(c) is primarily designed to call to the Commission's attention facts which may indicate that an uncontested grant was made *contrary to the public interest*, not to recall an uncontested grant and subject it to a comparative hearing in order to find the better of a number of prospective licensees.

8. In view of our ruling above, we find it unnecessary to consider the other points raised in the petition for reconsideration. However, a brief comment with respect to Federal's motion for consolidation and comparative hearing will be appropriate.

MOTION FOR CONSOLIDATION

9. After the grants without hearing were made, Federal filed its application for the use of Channel 10 in Rochester. Thereafter, but before the protest was filed, Federal filed the above-described motion for consolidation. It was denied for the reasons set forth in the previously described Memorandum Opinion and Order of April 1, 1953. In its opposition to the petition for reconsideration, Federal has somewhat modified its earlier position and has contended that since the Commission, by its Memorandum Opinion and Order of April 1, intends to hold a hearing on the application, it should, in its discretion, "consider under a specific issue to be heard in this Section 309(c) proceeding the positive qualifications of Federal Broadcasting Company as an applicant, which will substitute its services for that proposed in the applications whose grant is now subject to defeasance in the approaching hearing." Since we have concluded, on reconsideration, that the protest was fatally defective, that the effective date of the grant to WHEC and Veterans should not have been postponed, and that no hearing is required or necessary, this motion by Federal must also be denied.

10. ACCORDINGLY, in view of the foregoing, IT IS ORDERED, This 27th day of July, 1953, that the petition for reconsideration IS GRANTED; that the postponement of the effective date of the grants to WHEC, Inc. and Veterans Broadcasting Company, Inc. IS TERMINATED and said grants are MADE EFFECTIVE immediately; that Federal Broadcasting System, Inc.'s motion for consolidation IS DENIED; and that the proceedings herein ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
T. J. SLOWIE,
Secretary.

Released: July 27, 1953

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August 18, 1953

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Memorandum Opinion and Order

(Denying Appellant's Petition for Reconsideration)

By the Commission: Commissioners Webster, Doerfer and Lee not participating; Commissioner Hennock Dissenting and issuing statement.

1. The Commission has before it for consideration a "Petition for Reconsideration"[1], filed August 18, 1953 by the Federal Broadcasting System, Inc., licensee of Station WSAY, Rochester, New York, and an Answer filed jointly on August 23, 1953 by WHEC, Inc. and The Veterans Broadcasting Company, Inc. (hereinafter called WHEC and Veterans, respectively), Rochester, New York. A brief review of the history of this matter is necessary for an understanding of these pleadings and our decision.

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[1] Petitioner also submitted a "Supplement to Petition for Reconsideration" on November 23, 1953; in view of the matters there set out and the action taken herein, we need not further consider the Supplement.

2. The subject pleadings concern Channel 10 in Rochester, New York. In 1952, WHEC and Veterans filed competing applications to operate a television station on this channel. On March 4, 1953, the two applicants filed amendments to their applications which, among other things, requested permission to share time with one another in the use of the station proposed by each for operation on Channel 10. The Commission, in its public notice of March 9, 1953, advised that the amendments had been accepted for filing. The amended applications were granted without hearing on March 11, 1953 at which time no other application specifying Channel 10 in Rochester was pending. Thereafter, on March 17, 1953, petitioner filed a protest against the grants without hearing. The Commission, in its Memorandum Opinion and Order of April 1, 1953, considered the protest and concluded that petitioner, having alleged economic injury as a licensee of a standard broadcast station in Rochester, was a "party in interest." It granted the protest and designated the WHEC and Veterans applications for hearing upon appropriate issues to be delineated by further order of the Commission. However, on July 27, 1953, the Commission, acting on a petition for reconsideration filed by WHEC, reinstated the grants on the ground that the protestant's statements of "facts, matters and things relied upon was not specific enough to meet the requirements of Section 309(c) of the Act (for a full discussion, see Memorandum Opinion and Order of July 27, 1953). Federal now requests that the Commission reconsider its action dismissing the protest proceeding.

3. The subject petition does not dispute the bases or rationale of the Commission's July 27 decision. Instead, it requests reconsideration on the basis of "newly found facts" which are alleged to show our action of March 11, 1953 granting the share-time applications, to be procedurally defective. The "newly found facts" are derived from Minute No. 102-A-53 of the Commission's March 11 meeting. Petitioner alleges that this Minute demonstrates that

(1) the Commission acted arbitrarily and capriciously in considering these applications without the benefit of *written* reports and recommendations from its staff; and (2) that the favorable actions upon the WHEC and Veterans applications were not taken by a majority of the Commissioners participating.

4. We need not set out petitioner's allegations in greater detail. First, we point out that under the terms of 309(c), we are without jurisdiction to entertain or consider new factual allegations ("the facts, matters and things relied upon") submitted after the expiration of the 30-day protest period. Second, even were we to consider the new matters raised by the petition for reconsideration, no different result would obtain. For petitioner's arguments—based solely on Minute No. 102-A-53—are completely refuted by that Minute. Thus, with respect to the contention that a majority of those participating did not approve the share-time grants, the Minute shows that three Commissioners voted to grant the applications, two voted to pass, and one did not participate.[2] The latter, according to the Minute's introductory statement, was "not present and not participating during consideration of and action on applications 12(a) to 12(f); 12(o), 12(p), 12(r) and 12(s) [the latter two being the applications here involved]." And the Statement of this Commissioner bearing on 12(r) and (s) and related items concludes, "For these reasons I am abstaining from voting on [these] action[s] ...." Thus, it is apparent that a majority of those participating voted to grant the applications in question.

5. With respect to petitioner's argument that the procedure was illegal because of the absence of *written* reports and recommendations by the staff, we point out that the Act leaves to the Commission's judgment the appropriate manner in which its proceedings are to be conducted

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[2] One member of the Commission did not attend the March 11 meeting.

(4(j)); that in this instance, as had been previously done in the past,[3] a majority of the Commission, in view of the sizeable number of pending television applications available for consideration and final action, judged that an effort to accelerate the licensing process would be in the public interest; and most important, that petitioner's assumption that we acted without full knowledge of the relevant facts simply because we considered the applications on the basis of oral rather than written presentation from our staff, is entirely unfounded.[4]

6. In view of the foregoing, IT IS ORDERED, This 30th day of April, 1954, that the subject Petition for Reconsideration of the Federal Broadcasting System, Inc., Is DENIED.

FEDERAL COMMUNICATIONS COMMISSION*
MARY JANE MORRIS,
Secretary.

Released: May 3, 1954

* See attached Dissenting Opinion of Commissioner Hennock

DISSENTING OPINION OF COMMISSIONER HENNOCK

I would grant the relief requested by Federal Broadcasting System, Inc. in its Petition for Reconsideration of the Commission's action of July 27, 1953.

On April 1, 1953 the Commission granted Federal's protest under 309(c) of the Act to the grant to Veterans Broad-

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[3] Thus, numerous television broadcast applications were acted upon in the Television Agenda of July 11, 1952, on the basis of the examination of the written applications and oral presentations by appropriate staff members.

[4] Petitioner also requested the Commission to reinstate the application which it had submitted for Channel 10 and to designate the three applications for this channel for comparative hearing. In view of the above conclusions and those set out in our prior opinions, that request is denied.

casting Company and WHEC, Inc. for share-time operation on Channel 10 at Rochester, New York. The Commission postponed the effective date of the grant and designated the matter for hearing. On July 27, 1953 the Commission upon petition for reconsideration by Veterans and WHEC set aside its action of April 1 and made the grant of Channel 10 effective immediately.

The instant Petition for Reconsideration was filed by Federal on August 18, 1953, and is based upon "newly found facts." These "newly found facts" relate to the circumstances under which the original grant to Veterans and WHEC was made by the Commission on March 11, 1953. These were obtained from the official Minutes of the Commission's action of that date (Minute No. 102-A-53), which did not become available to Federal until August 5, 1953.

The facts on which petitioner relies were unavailable until the 5th of August—almost four months after the expiration of the statutory protest period—as a result of the Commission's delay in releasing the Minutes of the March 11 action. It is, therefore, unfair now to refuse to consider these facts on the ground that, as the majority states, "under the terms of 309(c) we are without jurisdiction to entertain or consider new factual allegations ... submitted after the expiration of the 30-day protest period." When, as here, the reason for petitioner's inability to obtain the needed facts was of the Commission's own making, it is our duty, when these facts finally become available, to find a way to give them proper consideration by means of a hearing. As a matter of fact, petitioner no longer solely relies on 309(c); its petition now before us is based on Section 405 of the Act. This Section gives us further authority to grant petitioner the relief it has now been seeking for over a year.

Petitioner's "newly found facts" raise substantial questions regarding the validity of the authorization to Veterans and WHEC in the light of the circumstances surrounding

this action and the procedure followed in making the grant on March 11, 1953. On that day, with respect to 48 of the 57 TV applications presented for action, the Commission dispensed with a written and separate memorandum for each of these many applications and took action based upon oral staff presentation. This could not possibly have afforded a reasonable opportunity for adequate examination by the Commission of the complicated facts and policies involved in this host of applications. In following such a procedure, the Commission radically departed from and was most destructive of its established and orderly internal processes. There was no critical situation involving the public interest which demanded the precipitate listing on the agenda, without memoranda, of the 48 TV applications constituting the remaining unprocessed and uncontested pending applications in processing lines A and B. Any suggestion that there was such public interest considerations is negated by the fact that the Commission permitted to be "withdrawn" 30 of the 48 applications which were so listed on the agenda.

In following the above described procedure the Commission failed to safeguard the interests of the public and other prospective *bona fide* applicants who were given no notice of this sudden acceleration of its normal processing activities*, to say nothing of the unfairness of the procedure to the applicants whose applications were "withdrawn" while other applications behind them on the processing lines were taken up and granted.

Section 1.372 of the Commission's Rules manifestly proscribed this procedure. The letter and the spirit of Section 1.372, as well as the other internal procedures of the Com-

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* Section 3 of the Administrative Procedure Act requires the Commission currently to publish ". . . statements of the general course and method by which its functions are channeled and determined . . ." An announcement of the adoption of this new procedure was not made until May 1953.

mission then applicable to the processing of applications and preparation of the weekly agenda had thus been violated. The grant of a construction permit for a television station is too vital and intricate a matter to be handled in such a precipitous and cursory manner.

In addition, there is serious question as to whether the grant to Veterans and WHEC was made by the majority of the Commissioners present and voting.

Petitioner is entitled to its "day in court" to present and argue on the record these facts and contentions.

FILED
NOV 22 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 482

WHEC, INC., and VETERANS BROADCASTING COMPANY, INC., *Petitioners,*

v.

FEDERAL BROADCASTING SYSTEM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1955

No.

WHEC, INC., and VETERANS BROADCASTING COMPANY, INC., *Petitioners,*

v.

FEDERAL BROADCASTING SYSTEM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 225 F. 2d 560.

JURISDICTION

The judgment of the Court below was entered on July 28, 1955. The petition for a writ of certiorari was filed on October 21, 1955. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission and the Court below were in error in finding, upon the specific facts of this case, that respondent was a "party in interest" entitled to file a protest under section 309(c) of the Federal Communications Act of 1934, as amended.

2. Whether the Court below was in error in its determination that the protest filed by respondent in this case contained an articulated statement of a fact or situation which would tend to show, if established at a hearing, that the grant of a license to petitioners contravened public interest, convenience and necessity or that petitioners were technically or financially unqualified as licensees.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Act of 1934, as amended, are set forth in the petition at pages 3 to 5, inclusive.

STATEMENT

Petitioners, in 1952, filed mutually exclusive applications for a television license in Rochester, New York. On March 4 and 5, 1953, respectively, following an agreement between them to share time in the use of the channel sought, they amended their applications so as to make them no longer mutually exclusive. On March 9, 1953, the Commission accepted the amendments for filing and gave public notice of its action. On March 11, 1953, the Commission, without a hearing,

granted petitioners a television permit for share-time operation. On March 17, 1953, respondent filed, under Section 309(c) of the Federal Communications Act of 1934, as amended, a protest stating, among other things, that as a licensee of a standard broadcast station in Rochester it had an economic interest in the grants which was antithetical to petitioners under the doctrine of *Sanders* v. *Federal Communications Commission,* 309 U.S. 470; that petitoner, WHEC, Inc., is a subsidiary of the Gannett newspaper chain, which has a monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in the State of New York and elsewhere, and owns a number of broadcasting stations; that the owners of petitioner WHEC Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of newspapers; that the commercial policies of petitioner Veterans Broadcasting Company, Inc., accord neither with accepted practice nor the commitments made as an applicant; that undoubtedly these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time and thus avoid a hearing; and that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing. The allegations of the protest were amplified in a reply, dated March 31, 1953, to petitioners' motion to strike the protest.

The Joint Appendix designated by petitioners as a part of the record before this court includes a copy of the above-mentioned protest (p. 33), a copy of the

above-mentioned amplification of the protest (p. 67), and a copy of an affidavit of respondent's president regarding the injury and losses suffered by respondent as a result of the grants made to petitioners by the Commission (p. 21). These documents are reprinted, for convenience of reference, in the appendix to this brief.

Respondent's protest was allowed by the Commission and the effective date of the grants was stayed in a Memorandum Opinion and Order adopted April 1, 1953 (Petitioners' Appendix, p. 16a); but in a Memorandum Opinion and Order released July 27, 1953 (Petitioners' Appendix, p. 20a), the Commission reconsidered its action of April 1, 1953, and made its grants to petitioners effective immediately.

Respondent's petition for reconsideration of the Commission's action of July 27, 1953, was denied in a Memorandum Opinion and Order released May 3, 1954 (Petitioners' Appendix, p. 25a). Respondent thereupon appealed to the Court below.

The Court below approved without discussion the Commission's holding that respondent was a "party in interest" entitled to file a protest. It stated that the Commission had, in the Court's opinion, properly so held.

The Commission had, in fact, beginning with its decision in the *Versluis* case (*In re application of Versluis Radio and Television, Inc.*, FCC 53-314, adopted March 23, 1953), consistently held that a licensee of a standard broadcast station filing a protest which contains allegations sufficient to indicate economic injury by the proposed operations of a television applicant is a "party in interest" within the

meaning of Section 309(c) of the Act. *Salinas Broadcasting Corp.*, April 7, 1953, 9 Pike & Fischer R.R. 192; *T. E. Allen & Sons, Inc.*, April 8, 1953, *Ibid.*, 197; *Patroon Broadcasting Co., Inc.*, July 22, 1953, *Ibid.*, 638; *Ohio Valley Broadcasting Corp.*, April 15, 1954, 10 Pike & Fischer R.R. 452. The Court had, moreover, in *Clarksburg Publishing Company* v. *Federal Communications Commission*, 225 F. 2d. 511, approved the Commission's interpretation of the words "party in interest" in the *Ohio Valley Broadcasting* case and had cited in support of that interpretation the decision of this Court in the *Sanders* case, 309 U.S. 470, and three of its own decisions: *Metropolitan Television Co.* v. *Federal Communications Commission*, 221 F. 2d. 879; *Camden Radio Co.* v. *Federal Communications Commission*, 220 F. 2d 191, 195; and *National Coal Association* v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F. 2d 462.

The decision of the Court below that respondent's protest should not have been dismissed by the Commission was based upon the Court's view that the protest contained an articulated statement of a fact or situation which would tend to show, if established at a hearing, that the grant of licenses to petitioners contravened public interest, convenience and necessity, or that petitioners were technically or financially unqualified, contrary to the Commission's initial finding.

ARGUMENT

On the facts of the case the decision of the Court below is clearly correct. There is no asserted conflict of decision. There is no important question of Federal law that requires decision by this Court.

I.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

The question suggested by petitioners (p. 2), whether a late-filing applicant is a "party in interest" under Section 309(c) of the Federal Communications Act, is not properly presented to this Court. The Court below disposed of respondent's argument that it was entitled to a hearing before the Commission on the basis of its late-filed application. Respondent has requested no relief from the Court's rejection of that argument.

The decision of the Court below, insofar as it approved the decision of the Commission in this case and in the above-cited cases of *Versluis, Salinas, Allen, Patroon,* and *Ohio Valley Broadcasting Company,* is fully supported by the decision of this Court in the *Sanders* case as well as by the decisions of the Court below in the *Clarksburg, Metropolitan, Camden,* and *National Coal Association* cases. The key words of the *Sanders* decision, from the point of view of the determination of parties in interest, are "one likely to be financially injured by the issue of a license" (309 U.S. 477). It is significant that a writ of certiorari has not been sought in any of the District of Columbia Circuit cases cited above.

The Court below considered it to be "clear from a reading of the statute and its history that Congress sought to require one protesting a unilateral grant of a license by the Commission to show in detail the factual basis of his grievances". There must be "some specification of events and circumstances", but the requirement of Section 309(c) of the statute was not to be measured by "the technicalities of pleading form-

erly applicable in civil litigation". Citing *Christianson* v. *Gaines* (85 App. D.C. 15), *Shotkin* v. *General Electric Co.* (171 F. 2d 236) and *Fleming* v. *Dierks Lumber & Coal Co.* (39 F. Supp. 237), the Court stated (225 F. 2d 563):

> "What is required is merely an articulated statement of some fact or situation which would tend to show, if established at the hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding."

It is submitted that "the technicalities of pleading" which were eliminated from civil litigation by the cooperative efforts of bench and bar nearly twenty years ago are, *a fortiori*, inapplicable in administrative proceedings.

It is submitted, further, that the cases cited by petitioners (p. 20), in which it was held that the circumstances alleged to constitute fraud or mistake must be stated with particularity, are not helpful to petitioners. In the first of these cases, *New York, N.H. & H. R. Co.* v. *New England Forwarding Co.*, 119 F. Supp. 380, the Court stated, at page 382, that where fraud is alleged, "enough facts must be set out to apprise the adversary as to what facts are relied upon as constituting fraud" and that "neither the original nor the amended complaint alleges or sets forth *any* facts pertaining to fraud" (emphasis supplied). In the second case, *Connor* v. *Real Title Corporation*, 165 F. 2d 291, the Court found, at page 294, that the plaintiff's averment of "a vicious conspiracy and collaboration" was "unsubstantiated by *any* facts disclosed in the pleadings" (emphasis supplied). In the third

case, *Crummer Co.* v. *Du Pont,* 118 F. Supp. 870, the specific question before the Court was stated by the Court, at page 871, to be "whether the facts alleged in the complaint, on plaintiff's claim of fraudulent concealment, are legally sufficient to toll the statute of limitations". The Court, after full consideration of all the allegations of the complaint, found and held, at page 376, that the complaint failed to allege sufficient facts to make an issue on the question of fradulent concealment. Each of these cases involved the application of Rule 9(b) of the Federal Rules of Civil Procedure, and in none of these cases was there any approach to the degree of particularity which the Court below found to exist in the present case.

Petitioner's attempt to bring a constitutional question into this case is wholly unwarranted. As observed by Mr. Justice Frankfurter in *National Broadcasting Co.* v. *Federal Communications Commission,* 319 U.S. 239, at page 259, "Whatever doubts may have existed as to whether the ingredients of 'case' or 'controversy' . . . are present in this situation were dispelled" by this Court's "ruling in the *Sanders Bros. Radio Station* case that the legality of a Commission order can be challenged by one 'aggrieved' or 'whose interests are adversely affected' thereby, even though the source of his grievance is not what is claimed to make the order unlawful". We do not have here, as in the *Muskrat* case (*Muskrat* v. *United States,* 219 U.S. 346), cited by petitioners (p. 17), an attempt to obtain an advisory opinion from a court, nor, as in the *Mellon* case (*Massachusetts* v. *Mellon,* 262 U.S. 447), also cited by petitioners (p. 17), a situation in which a person "suffers in some indefinite way in common with people generally". We have on the con-

trary, as this Court said in the *Sanders* case (309 U.S. 477), a situation in which Congress "may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license". This Court held specifically in that case that "it is within the power of Congress to confer such standing to prosecute an appeal". It had previously held, in *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.,* 288 U.S. 14, 26, that, under Section 2 of the Commerce Court Act, an aggrieved party may challenge a decree "not only to vindicate his own rights, but those of the United States as well".

II.

THERE IS NO ASSERTED CONFLICT OF DECISION

It is pertinent to note that the decision of the Court below in the present case, on the sufficient particularity of the allegations of a protest, has been cited and relied upon by the Commission in its Memorandum Opinions and Orders of November 2, 1955, upon the applications of Elyria-Lorain Broadcasting Co., FCC 55-1061; Richland, Inc. (WMAN), FCC 55-1062; and WBUF-TV, Inc. (assignor) and National Broadcasting Company, Inc. (assignee), FCC 55-1064.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW THAT REQUIRES DECISION BY THIS COURT

The government after mature consideration of the possibility of filing a petition for a writ of certiorari, decided against doing so. See statement of Appellee, September 8, 1955, copied in the appendix hereto.

Petitioners have an obvious interest in continuing their profitable operations as long as possible; their decision to seek a writ of certiorari can hardly have been predicated primarily upon a conviction that a decision by this Court is necessary in the public interest.

There is no question here, as in the *McCandless* case (*McCandless* v. *Furlaud,* 296 U.S. 140), cited by petitioners (p. 15), of the possibility that a former decision of this Court may require reconsideration.

There is no question here, as in the *Upshaw* case (*Upshaw* v. *United States,* 335 U.S. 410), cited by petitioners (p. 15), of the settlement of a matter of Federal practice.

We have here merely the question whether the Court below has correctly applied clear principles of law to the facts of a single case.

The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

(1) Protest to Grant of Applications, and Request for Hearing

Comes now Federal Broadcasting System, Inc., Rochester, New York, and, pursuant to Section 309(c) of the Communications Act of 1934, as amended, protests the action of the Commission of March 11, 1953, in granting the above entitled applications, and requests that the applications be designated for hearing.

In support of its protest, petitioner states as follows:

1. Petitioner is the owner and licensee of Standard Broadcast Station WSAY, operating at Rochester, New York. Petitioner has today filed with the Commission application for construction permit to erect a new television broadcast station to operate at Rochester, New York, on Channel 10.

2. On March 12, 1953, the Commission announced in Report No. 2196, TV Broadcast Actions, that it had granted applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., for permits to construct new television broadcast stations at Rochester, New York, to share time on Channel 10, with effective radiated power of 118 kw visual, 59.2 kw aural, and an antenna height of 351
380 feet above average terrain, Commissioners Walker and Merrill having voted to defer action.

3. Prior to March 4, 1953, the application of WHEC, Inc., specified unlimited hours of operation for the station proposed to be operated by it on Channel 10. On that date the Commission received an amendment changing the hours of operation requested to sharing with the station proposed by Veterans Broadcasting Company, Inc., and making substantial other changes in the applicant's proposal. The application of Veterans Broadcasting Company, Inc., likewise originally requested unlimited time on Channel 10. On March 5, the Commission received an amendment specifying part-time operation, its station to

share time with the station proposed by WHEC, Inc., and making other changes in the application. Receipt of the amendments was not announced by the Commission until March 9, 1953 (Report No. 4464 of Broadcast Applications Accepted and Tendered for Filing), when they were announced as accepted for filing. On March 11, the applications as amended were granted by the Commission without hearing. The action was not announced until 3:00 p.m. in the afternoon of March 12, however.

4. The sole stockholder of the petitioner corporation is Gordon P. Brown, who became the owner and operator of Station WSAY in 1936. Radio has been his avocation and vocation since his youth. He made at home the first television receiver ever seen in Rochester. In 1933 he became interested in constructing a television transmitter and investigated the possibilities, but found that the Commission was issuing only experimental authorizations. Early in 1948, he began preparation of an application for a permit to construct a television broadcast station at Rochester. Inasmuch as Pinnacle Hill, a site owned and controlled by the licensee of Station WHAM, was the only satisfactory site for a television station to serve
381 Rochester, he negotiated with Mr. William Fay, General Manager of WHAM, for location of a television transmission system on Pinnacle Hill, the site of WHAM-TV. Mr. Fay, however, refused to permit installation on WHAM's property of the television transmission plant proposed by Mr. Brown. In a telegram dated April 14, 1948, to counsel for Mr. Brown, Mr. Fay stated, "We do not wish to make further commitments regarding use by WSAY of our site on Pinnacle Hill." Mr. Brown subsequently filed a protest to Mr. Fay's action with the Federal Communications Commission. An application was completed except with respect to the engineering data, which could not be completed because of inability to conclude arrangements for a satisfactory site. The filing was held in abeyance pending further negotiations with respect to

the transmitter site and no satisfactory solution had been reached when the freeze on construction of television stations was announced.

Following the ending of the freeze, Mr. Brown made arrangements to acquire possession of property higher on Pinnacle Hill than the WHAM-TV transmitter site and took additional steps to perfect his application for Channel 10. Time-consuming investigations and negotiations preceded the acquisition of the property and lengthy negotiations for obtaining permission from the Town of Brighton to erect a 200-foot tower by the property followed. The negotiations commenced, in fact, prior to the ending of the freeze and were extended primarily because of objections to the tower by WHAM and the American Telephone and Telegraph Company, which owns property adjacent to that purchased by Mr. Brown. It was because of the lengthy negotiations for authority to erect a tower on the proposed site that an application to the Commission was not filed months ago. In the meantime arrangements were completed between WHEC, Inc., and WHAM, and between Veterans Broadcasting Company, Inc., and WHAM, for installation of television antennas on the WHAM-TV tower.

382 5. Throughout petitioner's difficulties in regard to obtaining a satisfactory transmitter site the applications of both WHEC, Inc., and Veterans Broadcasting Company, Inc., specified unlimited hours of operation and were mutually exclusive. Under Commission procedure there was no reason to expect a final decision or a hearing on either application for many months, perhaps years. Because of the lack of public notice by the Commission of the tender of the amendments specifying a sharing-time arrangement for the stations proposed by WHEC and Veterans until scarcely 40 hours before the grant of the applications, petitioner had insufficient time following such notice to complete the application then in preparation.

6. Petitioner's application for construction permit has been completed and tendered to the Commission and petitioner desires that it be accepted for filing and designated for hearing with the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., as mutually exclusive applications. Petitioner submits that he is a party in interest with respect to these applications granted on March 12, first, because the grants do not become final until the expiration of the 30-day period following the grants and petitioner has filed a mutually exclusive application; second, the failure of the Commission to make adequate announcement of the amendments, which made the applications eligible for a grant without a hearing, deprived petitioner of due process; and, third, both as an applicant for television facilities in Rochester and the licensee of a standard broadcast station in Rochester petitioner has an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc., under the doctrine of *Sanders* v. *Federal Communications Commission*, 309 U.S. 470.

383 7. A consideration of the legislative history of the Communications Act amendments of 1952 indicates that "parties in interest" from an economic standpoint are defined by the Supreme Court decision in the Sanders Case, which held that a person with an adverse economic interest has a right of appeal from a Commission decision. In Senate Report No. 44, on S. 658, 82nd Congress, 1st Session, page 8, it was stated that "fear has been expressed that the use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest, but solely with the purpose of delaying license grants which properly should be made". Petitioner believes, however, that it has a "legitimate interest". It does not seek intervention solely with the purpose of delaying license grants which should properly be made, but comes within the definition of a party in

interest as intended by Congress, regardless of its economic interest antagonistic to that of Veterans and WHEC.

Although holding that an AM licensee was not a party in interest as a result of economic interest in the matter of a grant of television facilities (In re Application of Versluis Radio and Television, Inc., adopted February 5, 1953) the Commission recently recognized that the Sanders doctrine was applicable to persons filing applications for television facilities.

It should be noted that the Department of Justice takes the position that the term "party in interest" is not limited to those parties suffering electrical interference (the KOA case) or economic interest (the Sanders case). The Department has taken the position in the Transit Riders' Inc. case presently in the Court of Appeals for the District of Columbia, that public citizens having no direct financial interest in broadcasting should be considered embraced within the term. The concession by the Justice
384 Department that radio listeners should have stood before the Commission is urged by Petitioner to demonstrate its own standing, not only as an interested party, but further, as a candidate for the television facilities designated by the Commission's order of March 11, 1953.

8. Petitioner urges that the basic purpose of 309(c) of the Communications Act, as amended, is to permit protests to unreasonable grants made prior to an opportunity for a study and objection to applications for radio or television facilities. This was recognized by the Commission through Commissioner Hyde, who, in testifying for it before a subcommittee of the Senate Committee on Inter-State and Foreign Commerce, with respect to Section 8 of S. 1973 (which contained phraseology virtually identical with that now in Section 309(c) of the statute), in a prepared statement said:

"It is difficult to ascertain why the cumbersome procedure set forth in Section 8 is considered desirable. If it is believed that the Commission *acts on applications too soon after they are filed, or does not permit an adequate opportunity for members of the public to present any relevant information* they may have, a better method exists for achieving this result." (Emphasis added)

Despite the objections of the Commission, Congress incorporated Section 8 of S. 1973 into the public law with inconsequential changes, and petitioner consequently urges that under the circumstances of the present case he is entitled to a hearing on the assignment of Channel 10 in Rochester, New York. Any other procedure would result in injury to petitioner and denial of the procedural due process assured to it under the Fifth Amendment to the Constitution of the United States. Denial of a hearing in such cases could result in the grossest abuse of administrative procedure and constitutional guaranties. Should petitioner's protest to the Commission's actions of March 11 be rejected,

385 the door is open for the speeding of the processing of applications to the extent that an applicant might, in an extreme case, receive a grant immediately after a rule making such a grant possible becomes effective, and thus make the grant immune from attack by other parties having an interest therein. The Commission has recognized in certain instances that such abuses might occur and has attempted to safeguard against them by announcing that applications would not be considered until a certain period has elapsed. For the same reasons that influenced the Commission in those well known instances, protests to the grants to WHEC and Veterans applications, made so quickly after amendment of the applications to eliminate mutual exclusivity, should be considered. Applicants should not be permitted through collusion with one another, and the taking advantage of the Commission's procedures, to avoid a hearing and to destroy a competitive situation of the type fostered by the Commission. The least that

should be expected of the Commission is careful scrutiny of the qualifications and proposals of the applicants in this instance by means of a hearing.

9. Petitioner avers and verily believes that competent testimony submitted at a competitive hearing would disclose that neither WHEC, Inc., nor Veterans Broadcasting Company, Inc., could prevail against petitioner. WHEC, Inc., is a subsidiary of the Gannett Newspaper chain, which has monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in New York and elsewhere, and owns a number of broadcasting stations. Unlike this petitioner, the owners of WHEC, Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of newspapers. It is doubted that the financial qualifications of Veterans Broadcasting Company, Inc., could withstand the
386 careful scrutiny to which they would be subjected at a competitive hearing, and the commercial policies by which they conduct WVET accord neither with accepted practice nor the commitments made as an applicant. Undoubtedly, these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time on Channel 10 and thus avoid a hearing. It is submitted, also, that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing.

10. Petitioner is aware of the provisions of Section 1.382(b) of the Commission's Rules and Regulations which requires that an application to be considered mutually exclusive with applications already on file must be filed not later than the close of business on the day preceding the day on which the Commission takes action with respect to the applications previously filed. Petitioner submits,

however, that the Rule is in conflict with the provisions of Section 309(c) of the Communications Act, as amended, and does not afford due process to other parties in circumstances such as these. Under the particular circumstances of this case strict application of such a Rule works a grave injustice.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner respectfully prays that the Commission:

(a) Accept for filing Petitioner's application for permit to construct a new television broadcast station at Rochester, New York, to operate on Channel 10;

(b) Rescind the action of March 11 granting the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc.; and

387 (c) Designate the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., for hearing in a consolidated proceeding with petitioner's application.

Respectfully submitted,

FEDERAL BROADCASTING SYSTEM, INC.

By GORDON P. BROWN
Gordon P. Brown, *President*

March 17, 1953

Subscribed and sworn to before me this 17th day of March, 1953.

ROBERT E. GORISH
Notary Public

(SEAL)

My commission expires March 31, 1956.

(2) Reply to Motion to Strike Protest and Motion to Return Application of Federal Broadcasting System, Inc.

Federal Broadcasting System, Inc., by its Attorneys, hereby submits its reply to the motion of WHEC, Inc. (hereinafter referred to as WHEC), and Veterans Broadcast Corporation, Inc. (hereinafter referred to as Veterans) to strike the Protest to Grant of Applications and Request for a Hearing and motion to return the application of Federal Broadcasting System, Inc., for permit to construct a new television station to operate on Channel 10 at Rochester, New York.

In support thereof, Federal Broadcasting System, Inc. (hereinafter referred to as Petitioner), states as follows:

1. Petitioner's careful consideration of the said motion to strike petitioner's protest fails to reveal any matters in fact or in law tending to jeopardize petitioner's position in this matter. Respondent's delineation of the law prior to the 1952 amendments to the Communications Act, as amended, is interesting and, had the McFarland Bill not been passed by the 82nd Congress, would have been of considerable validity. The obvious intent and purpose
416 of Section 309(c) of the Communications Act, as amended, added thereto by the 82nd Congress, have been set out in detail by petitioner's original pleading in protest of the grant to WHEC and Veterans. Since the filing of the said original pleading petitioner has noted with satisfaction the Commission's Memorandum, Opinion and Order in the *Versluis* case, FCC 53-314, released March 23, 1953, wherein the Commission held that a standard broadcast licensee was a "party in interest" within the meaning of Section 309(c) and might protest a grant of television facilities, though the standard broadcast licensee was not an applicant for a television station. In confirming the position of petitioner herein, the Commission in the *Versluis* opinion made it evident that Federal, as licensee

of standard broadcast station WSAY, was a party in interest in the instant proceedings and therefore entitled to legal and equitable protest of the untimely grant of television facilities to the combined applicants, WHEC and Veterans.

Further, a recent decision of the Court of Appeals in *National Coal Association* v. *Federal Power Commission*, 191 F. 2d 462 (1951, CCA of D. C.), confirms analogously, in the realm of federal power regulation, the standing of petitioner in the field of radio and television. In the National Coal Association case it was held that the Association, the United Mine Workers, and the Railroad Labor Executive Association were sufficiently parties in interest to protest a certificate of public convenience and necessity issued by the Federal Power Commission to a gas pipeline. In that case, as in this, a grant of authority would have an impact upon the business of protestants. As pointed out in petitioner's original pleading, as licensee of WSAY it falls squarely within the purview of the letter and spirit of new Section 309(c).

2. Respondents have contended with prolixity that petitioner has not apprised them of specific and detailed
417 facts "with minute particularity" as to the reasons why the tentative grant to WHEC and Veterans is not in the public interest. Respondents rely in great measure in the Versluis Memorandum, Opinion and Order, on the alleged particularity with which facts were set forth in the protest in that case. And well might respondents grasp at any apparently available straw in an effort to avoid the direct, clear and unequivocable ruling of the Commission in the Versluis opinion. Petitioner points out, however, that in the Versluis case the protestant alleged economic injury and sought to show that a grant of television facilities to his competitor was not in the public interest; in the instant case, however, petitioner seeks primarily not a finding by the Commission that a grant to

WHEC-Veterans is not in the public interest, *per se*, but rather that a comparative hearing should and must be held in order that the Commission may determine which of the applicants, Federal or WHEC-Veterans, is better qualified to serve the public.

3. Petitioner's station WSAY relies upon advertising business of merchants in Rochester and vicinity, and that of national advertisers desiring to reach potential customers in the Rochester trade area, for the income necessary to operate the station. The television stations proposed to be erected by WHEC and Veterans will rely upon those same advertisers. They will make demands, also, upon the program sources upon which Federal must rely, increasing the expense of operating Federal's station, WSAY. Thus, there will be added to the existing competition, and the present economic hardships to which Federal is subjected, the competition of two additional TV stations —stations whose owners already have unfair competitive advantage by reason of affiliated business interests and unfair trade practices. As shown by Federal's application for permit to construct a television broadcast station
418 in Rochester, Federal's station WSAY is already operating at a loss. It has operated at a loss continuously since several years ago, when, at approximately the same time, three additional standard broadcast stations, including WVET, were constructed in Rochester pursuant to authority of the Commission. WSAY's losses during the past five years have been in excess of $150,000, though they have gradually decreased to the point where petitioner had hope of eliminating them—a hope that certainly cannot be realized if WHEC and Veterans are permitted to operate TV stations in competition therewith and in accordance with certain practices heretofore followed by them.

4. Petitioner urges that the Commission afford serious consideration to respondents' apparent great fear of the outcome of such a comparative hearing. Federal has not

and does not urge that it should receive a grant of Channel 10 in Rochester and that the application of WHEC-Veterans should be disregarded; instead, petitioner is confident that the facts brought out in a full and complete hearing, as required by the Communications Act, as amended, and the Commission's Rules and Regulations, will reveal that operation on Channel 10 by Federal would be more in the public interest than such operation by WHEC-Veterans.

In particular, petitioner submits that a grant to WHEC-Veterans in the light of reciprocal sell-out provisions in a contract between WHEC and Veterans is but a subterfuge for permitting WHEC to receive a grant at this time in conjunction with Veterans and, after a decent interval, purchase the interest of Veterans and thus tend further to create a communications monopoly in the City of Rochester. In this connection petitioner shows that WHEC is owned by the Gannett newspaper chain which also owns the only two daily newspapers in the City of Rochester, and a grant of television facilities to WHEC would tend further
419 toward a "concentration of the media of mass communications in a single corporate entity" throughout the Rochester area. The communications media controlled by Gannett Co., Inc., and by Frank E. Gannett, as set forth in WHEC's application, are listed in Appendix A, attached hereto. Various aspects of monopolistic control have ever been of primary and vital concern to the Commission.

5. Not only does the Gannett organization have control over large and important segments of the media of mass communication in the Rochester area, but it has been guilty of using such control to further its own broadcast interests in competition with others. For example, over the protests of WSAY, the Gannett newspapers have persisted in designating in published schedules programs of WSAY as "records" while refraining from describing in similar fashion record programs in WHEC's schedules. Though

a small thing in itself, such practices over a period of time have an accumulative harmful effect.

The influence of the newspapers is felt in many ways, of course. The advantage of newspaper affiliations, for publicity reasons, in arranging network affiliations is an important one. Certainly, petitioner, and probably other Rochester stations, have been unable to obtain the valuable newspaper publicity for their programs that WHEC has had. Furthermore, though the Commission has made clear that it regards equal opportunity for presentation of all views on controversial questions essential to fair play and service in the public interest, the newspapers are subject to no such influence. Thus, while WHEC and Veterans expressed their views in the Rochester newspapers concerning this protest, a request that a letter from this protestant to the managing editor of the Rochester Times-Union presenting protestant's views on the matter was ignored. The letter is attached hereto as Appendix B.

420 It is submitted that, without doubt, the factors of newspaper control, lack of integration of ownership, with management, and lack of diversification of ownership, all unfavorable to WHEC, influenced that applicant in its decision to accept part-time operation on Channel 10 rather than risk a competitive hearing. These are issues that should have been determined in a hearing, even though amending the application removed all conflict with pending applications.

6. Veterans Broadcasting Co., Inc., has had financial difficulties in which one of the Rochester banks became involved to the extent of $100,000 or more, and, this circumstance, or pressure brought to bear upon certain merchants by the bank resulted in their placing their advertising with WVET. WVET, in fact, has operated, almost since its inception, in a manner indicating lack of financial health. Notwithstanding promises in the Veterans applications to limit the commercial content of programs acceptably, WVET broadcasts regularly a 30-minute program in which

the entire time is devoted to commercial advertising, as can be proved through recordings. Other commercial tactics of WVET have been of such a character that petitioner prefers to operate unprofitably rather than to degrade its programs through adoption of such questionable practices. Such practices, related to the sale by a New York brokerage firm of time on WVET, on its own forms, resulted in at least one complaint to the Commission (by the Skuse Shoe Co.) concerning them. While some of these matters undoubtedly came to the Commission's attention in the past, others have not. In any event, a hearing on the Veterans application should be held, to determine the financial and other qualifications of this applicant.

7. Both WHEC and Veterans have arbitrarily refused, contrary to the Commission's rules, requests by WSAY for permission to rebroadcast sponsors' programs
421 broadcast by those stations, in which programs they do not own property rights. The Commission has clearly stated that such refusals are not in the public interest. Such refusals not only adversely affect WSAY economically but prevent a large segment of the public from hearing the programs. It is petitioner's contention that such actions should be considered in connection with the qualifications of WHEC and Veterans to operate additional broadcast stations.

8. Evidence relating to all the foregoing specific matters will be adduced by WSAY in "minute particularity" at the formal hearing requested by petitioner's original pleading in this matter. Petitioner stands ready to furnish facts relating to all of the aforementioned aberrations of WHEC and/or WVET at a hearing or other fact finding investigation conducted by the Commission.

9. In support of its motion that petitioner's application be returned, WHEC and WVET have sought to show that petitioner delayed filing a television application only because of lack of interest in doing so. However, the files

of petitioner disclose an application complete as of April 27, 1948, except for engineering, and another dated 1952, also substantially complete except for engineering, which, in both instances, was not completed because of uncertainty as to transmitter site.

In footnote 3 to the reply of WHEC-Veterans, Mr. Brown is quoted as saying that he was "not so interested in television." Other portions of the minutes mentioned, including the paragraph from which a sentence was quoted, indicated his interest in constructing a tower to
422 support one or more television antennas.[1] Furthermore, he was aware of the fact that friends of his competitors were members of the board and he therefore did not wish to reveal more than necessary of his television plans. The telegram[2] dispatched to the Commission by Mr. Brown on April 27, 1948, indicates the intentions of petitioner as of that date. Unfortunately, the application and other data mentioned in the telegram were not filed because

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[1] Mr. Ely: Do I understand that you have broadened your requests? You were talking two-way radio, which had nothing to do with television.

Mr. Brown replied that it was correct. He had talked of two-way radio, that it is possible that the request may be broadened, inasmuch as he has the location.

Mr. Furmoile: I assumed that your application was for radio, now it seems to be radio and television.

Mr. Brown then went on to say about the grant being made and the interest he had in the Board of Education using his tower, further that there were five channels available, that he was refused position on the present tower and when he was refused he had to buy his own position.

Mr. Brown: In order for me to file an application with FCC I have to have a site that I can use. The other two went to Stromberg-Carlson and they gave approval, which prevented WSAY from filing an application two or three years. I am not so interested in television until I can see that it will pay off. I am interested in the two-way system. All I want to do is to put the tower up there. We have five channels coming to Rochester, there is no question about it. They can handle three, I can handle two. The Board of Education station has actually been granted.

[2] WSAY has been refused permission to use Pinnacle Hill site of WHAM television transmitter in apparent violation of F.C.C rule relating to availability of television sites by all applicants.

Television applicants WHEC and WARC have been granted the right to use Pinnacle Hill site by WHAM.

Since refusal to WSAY to use site apparently is for the purpose of forestalling WSAY application until the applications of WHEC and WARC are granted by F.C.C. I urgently request the Commission's investigation into the situation before the granting of the applications of WARC and WHEC without a hearing.

I am forwarding complete data to you via my attorney tomorrow.

of subsequent announcement by the Commission of proposed reallocation of television channels and the holding of a hearing on that and related matters. The "freeze" followed the initial hearings and the Commission requested that no applications be filed until the proceedings were concluded. The minutes of the meetings of the Planning Board of Brighton indicate the continuing efforts made by Mr. Brown to obtain a satisfactory antenna site
423 despite obstacles placed in his way, directly or indirectly, by others, including the parties most interested in reducing competition for television channels in Rochester.

WHEREFORE, Protestant prays that the Motion to Strike Protest and Motion to Return the Application of Federal Broadcasting System, Inc., be dismissed and, as requested in protestant's original pleading herein, these matters be designated for formal hearing by the Commission in accordance with the law.

Respectfully submitted,

FEDERAL BROADCASTING SYSTEM, INC.

By GORDON P. BROWN
Gordon P. Brown, *President*

March 31, 1953

Subscribed and sworn to before me this 31st day of March, 1953.

VERA B. HOPKINS
Notary Public

(Seal)

My commission expires Oct. 14, 1956.

(3) Affidavit of Gordon P. Brown in Support of Appellant's Motion for Interlocutory Injunction

District of Columbia, City of Washington, ss:

Gordon P. Brown being duly sworn, deposes and says:

(1) I am the president and controlling stockholder of the Appellant herein, Federal Broadcasting System, Inc. (hereinafter called Appellant). Appellant has been the owner and operator of Station WSAY since 1936. Deponent states that since his youth both his vocation and avocation have been in the radio electronics art. He constructed in 1927 the first television receiver ever seen in the city of Rochester. His interest in television commenced as early as 1933, when he investigated the possibility of constructing a commercial television transmitter, but learned that the Commission was only issuing experimental authorizations. He has been in the radio broadcasting buisness for the past thirty years in various capacities not only as owner and operator of the station but also in sales, administrative and programming capacities.

(2) The notice of appeal herein sets forth the facts and matters upon the basis of which review is sought of the Memorandum Opinion and Order of the Federal Communications Commission issued May 3, 1954 granting television channel 10 in Rochester, New York, to WHEC Broadcasting Company, Inc. and Veterans Broadcasting Company, Inc., dismissing Appellant's Petition for Reconsideration and refusing to reinstate the application which Appellant had submitted for channel 10 and to designate the WHEC, Veterans and Appellant's applications for comparative hearing.

(3) This affidavit is made in support of Appellant's motion requesting an interlocutory injunction, pending final hearing and determination of the appeal, ordering WHEC and Veterans to account for the profits derived from their operations on channel 10 in Rochester since March 11, 1953,

the date of the illegal grant, and to impound the said profits pending final determination of the appeal.

(4) Federal Broadcasting System, Inc., under license from the Commission, operates standard broadcast station WSAY in Rochester.

(5) Early in 1948, Federal Broadcasting System, Inc. began preparation of an application for construction permit to operate a television station in Rochester, New York. The only satisfactory antenna site then available in Rochester was Pinnacle Hill, which was owned and controlled by the licensee of Station WHAM. Therefore, Federal Broadcasting System, Inc. commenced negotiations with Mr. William Fay, general manager of WHAM, for the location of its television antenna system on Pinnacle Hill. Mr. Fay, however, refused to permit installation on WHAM's property of the television transmitter proposed by Federal Broadcasting System, Inc., notwithstanding the requirement of the Commission's rules providing for joint use in such circumstances. By telegram dated April 19, 1948 addressed to counsel of Federal Broadcasting System Mr. Fay stated: "We do not wish to make further commitments regarding use by WSAY of our site on Pinnacle Hill." Federal Broadcasting System protested to the FCC against Mr. Fay's rejection of Federal's proposal, but the Commission took no action. Federal was unable to provide the Commission with complete engineering data because of its inability to arrange for a satisfactory antenna site but completed the application with exception of the engineering. Federal then deferred the filing of the said application pending further negotiations with respect to a satisfactory antenna site. Thereafter the Commission imposed a "freeze" on the further construction of television stations.

(6) Upon the termination of the said "freeze" order with the issuance of the Sixth Report and Order by the Federal Communications Commission in April, 1952, Fed-

eral Broadcasting System, Inc. took immediate steps to perfect its application for Channel 10 in Rochester. Negotiations were initiated with WHAM to secure the right to use property on Pinnacle Hill different from and higher than the transmitter site of WHAM-TV. Thereafter Federal was compelled to enter into time consuming investigations and negotiations not only to acquire the necessary property but also to secure the consent of the town of Brighton, New York to erect a 200 foot tower on the said property. The delay in securing the consent of the said municipality stems primarily from the objections filed with the municipal officials by WHAM and the American Telephone and Telegraph Company, which owned property adjacent to that owned by Federal Broadcasting System, Inc. Indeed, the delay in filing the application for Channel 10 in Rochester to the Commission was due solely and entirely to the oppositions set up by the competitors of Federal Broadcasting System, Inc. to secure municipality approval of the proposed engineering site. Meanwhile, WHAM, the said competitor which was responsible for blocking the consummation of Federal's attempt to perfect suitable engineering arrangements, contracted with WHEC and Veterans for the installation of television antennas to be owned by the said companies on the WHAM-TV tower on Pinnacle Hill.

(7) During the said period, when Federal Broadcasting System, Inc. was attempting to negotiate for a final engineering site, the applications filed with the Commission by WHEC and Veterans specified unlimited hours of operation on Channel 10 and were mutually exclusive. There was no Commission procedure for processing the television broadcast applications of WHEC and Veterans other than that which would entail a hearing after a delay of many months. The first public notice which Federal received that the processing of the applications of WHEC and Veterans might be expedited was on March 9, 1953, when the Commission released an announcement of the filing of

amendments requesting that the Commission authorize the stations proposed by WHEC and Veterans to share time on Channel 10. Shared time authorization permits the division of the use of the same channel at different times of the day by different operators each with its own network facilities, thus denying the public access to full programming. It is a dissimilar and inferior service to full channel occupancy of which the public in the Rochester market had no notice or opportunity for protest. Within 40 hours the Commission, on March 11, 1953, granted the applications as amended. The Commission members could not have even read the many applications thus advanced and had no basis for formal consideration of them.

(8) The Appellant, Federal Broadcasting System, Inc., did not have sufficient time after the public notice of March 9, 1953 to complete its application and file it so as to insure the institution of a comparative hearing. It was not until March 17, 1953 that the Appellant was able to finalize its application for Channel 10 in Rochester, New York. However, Federal Broadcasting System, Inc. was, as of March 4, 1953, when the amendments of WHEC and Veterans were filed, and thereafter and for many years prior to this period, a prospective bona fide applicant for Channel 10 in Rochester, New York.

(9) On March 17, 1953 the Appellant filed a protest against the grants of the amended applications of WHEC, Inc. and Veterans Broadcasting Company, Inc. The Federal Communications Commission, in its Memorandum Opinion and Order of April 1, 1953 granting the protest and designating the WHEC and Veterans applications for hearing on appropriate issues thereafter to be delineated by the Commission, concluded that Appellant, having alleged economic injury as a licensee of standard broadcast station WSAY, was a "party in interest". On July 27, 1953, however, the Commission, acting upon a petition for reconsideration filed by WHEC and Veterans, reinstated the grants on the ground that the Appellant's statement

of "facts, matters and things relied upon" was not strong enough to meet the requirements of Section 309(e) of the Communications Act of 1934, as amended. There were no adequate or detailed findings to support this action. Soon thereafter WHEC and Veterans commenced construction of television stations to operate on Channel 10 in Rochester and subsequently commenced telecasting.

(10) The impact of the television operations of WHEC and Veterans upon the existing economic welfare of Federal Broadcasting System's standard radio broadcast station has been severely detrimental. The period since commencement of the operation of television service on Channel 10 by WHEC and Veterans is one in which non-network, individual radio operation has witnessed extremely sharp and rapid increases in revenues throughout the radio industry. Independent radio had been experiencing a prosperity stemming from the proven ability of the radio medium to compete with the televison medium on a compatible basis. It was during the latter part of 1953 that the advertising industry learned that large portions of the advertising dollar could be effectively channeled so as to support certain types of radio programs of the non-network variety. It was this type of programming service which Station WSAY, Appellant's station in Rochester, provides the public in that community.

(11) Appellant's standard broadcast station, however, has not enjoyed this pronounced increase in independent radio revenue. Indeed, Appellant's standard broadcast station has suffered a severe deviation from the trend under competitive conditions which would not have occurred but for the illegal grant of television permits to WHEC, Inc. and Veterans Broadcasting Company, Inc. and the coordination of their radio and television operations with network support and collusion.

(12) The injury and losses inflicted upon Appellant's broadcast station stem from several causes. First, the

fact that the Appellant competes in the standard broadcast field with the standard broadcast stations of WHEC and Veterans, who are television owners and operators, has unduly enhanced the prestige of the respective radio stations of WHEC and Veterans at the tremendous expense of good will and profits of Appellant's radio station. The advertising industry has been put on notice that the Federal government through the Commission has recognized the ability of WHEC and Veterans to operate in the television and radio field and has not seen fit to give equal consideration to the Appellant's qualifications as an operator in the public interest. This sudden shift in the intangible field of good will and commercial profits has impaired the ability of the Appellant to secure time sales which would normally flow to its standard broadcast station.

(13) A second impairment to the Appellant's commercial position in the standard broadcast medium is its competitive inability to secure network affiliations as a direct result of the grant to WHEC and Veterans of television licenses. It is obvious that not until television channel 10 was granted to the Veterans Broadcasting Company, Inc. was that company able to secure the network affiliation of the American Broadcasting Company for its station WVET. This is more than a coincidence. It is a commercial arrangement which fulfilled the desire of the American Broadcasting Company to affiliate with a VHF television station in Rochester. The impact on the advertising industry is exemplified by the advertisement appearing in the magazine "Sponsor" on January 25, 1954, attached hereto as Exhibit A as verified by this affidavit. It clearly demonstrates that Veterans Broadcasting immediately exploited its position, because desirable in the radio broadcasting medium for the first time in many years of operation, obviously as a result of its receipt of a television grant. Appellant wishes to make it clear that the said network affiliation has enhanced the competitive potential of the Veterans Broadcasting station, not because the said station will profit so much from the receipt of network revenue but because the assured supply of network

programming enables that radio station to maintain its listening audience during short periods adjacent to the network programming and thus attracts the very lucrative revenue which is normally available to non-network stations as well as to network affiliated stations.

(14) Appellant emphasizes that the economic injury inflicted upon its standard broadcast station as a result of a television grant to a standard broadcast competitor in the city of Rochester does not depend solely upon any illegal trade practices, tie-in arrangements or combination sales in this particular instance but is a material economic result of the said competitor's owning both a radio and television station.

(15) The loss to Appellant's standard broadcast operation has not been only one of revenue. There has been an impairment of its ability to secure capital, should the appellant have desired it, as a result of its loss of prestige and good will in the light of the fact that it is precluded from ownership of a VHF television station while its competitors own one.

(16) Appellant has been subjected to additional injury simply as a result of the fact that it has been unable to engage in a television operation for which it would have had a fair opportunity to receive competitive consideration by the Federal Communications Commission if the alleged illegal grant had not been made to appellant's competition. The loss of that opportunity to engage in an operation on channel 10 in Rochester may be estimated at many millions of dollars. Appellant states that, given a fair opportunity to compete for Channel 10 in Rochester, it is prepared to offer financial, technical and program proposals designed to serve the public interest, convenience and necessity, and that its qualifications as a licensee of a television broadcast station are vastly superior to those to whom the grants have been illegally made. Appellant alleges that the continuance of the operation on television Channel

10 in Rochester by WHEC and Veterans Broadcasting Company, Inc. will inflict irreparable injury on the Appellant pending final determination of this case upon its merits, and that the maintenance of the status quo as it existed prior to the Commission's making an illegal grant is absolutely essential. Appellant recognizes that the public interest justifies the continuance of television broadcasting service in the City of Rochester. In the light of this conclusion, therefore, Appellant further proposes that the said stations be operated on an interim basis in such manner that the existing owners account to the Court for profits derived since the said illegal grant from the operation of the stations, and that the same be impounded for equitable distribution after final determination of the rightful licensee of the frequency pursuant to Section 309 of the Communications Act of 1934, as amended. Appellant believes and states unequivocally that this proposal is practicable as a means of preventing injury while maintaining the status quo pending determination of the case on the merits, and of continuing the service now provided on Channel 10 to the people of Rochester. Alternatively, subject to the Court's discretion, Appellant states a willingness to participate in an interim corporation in which Appellant invests capital on a basis equal to the combination of WHEC and Veterans Broadcasting and incurs liability on an equal basis for operating expenses. Thereafter, upon the final conclusion of the administrative procedure required by the Communications Act of 1934 as amended, Appellant is willing to comply with the final determination of the Commission and either surrender or take over the assets and liabilities of the station as then existent.

(17) A grant of such relief would merely effect the maintenance of the status quo. Moreover, the public interest would be further protected. It would be assumed that the best of the potential competitors for Channel 10 in Rochester would be selected ultimately, in accordance with

the statutory criterion of public interest, convenience and necessity.

GORDON P. BROWN
Gordon P. Brown

Subscribed and sworn to before me this 2nd day of June, 1954.

ROSE M. BROWNING
Notary Public

(SEAL)

My commission expires
August 31, 1956

(4) Statement of Appellee re Certiorari

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,252

FEDERAL BROADCASTING SYSTEM, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WHEC, INC., *Intervenor,*

VETERANS BROADCASTING COMPANY, INC., *Intervenor.*

Statement of Appellee With Respect to Filing of Petition for Certiorari

The Federal Communications Commission, appellee in the above-entitled action, wishes to advise the Court that, after consultation among counsel for the Commission, the Commission and the Solicitor General's Office, it has been determined that a petition for certiorari on behalf of the Commission will not be filed in the Supreme Court in this action.

Respectfully submitted,

WARREN E. BAKER
General Counsel

J. SMITH HENLEY
Assistant General Counsel
Federal Communications
Commission

September 8, 1955

End